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46

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF COMMON PLEAS,

FOR THE

CITY AND COUNTY OF NEW YORK.

By CHARLES P. DALY, LL. D.,
FIRST JUDGE OF THE COURT.

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1859

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JUDGES
OF THE
COURT OF COMMON PLEAS
FOR THE
CITY AND COUNTY OF NEW YORK,
SINCE ITS REORGANIZATION IN 1821,
WITH THE YEARS IN WHICH THEIR OFFICIAL TERMS ORIGINALLY
COMMENCED.

JOHN T. IRVING	1821
MICHAEL ULSHOEFFER	1834
DANIEL P. INGRAHAM	1838*
WILLIAM INGLIS	1839
CHARLES P. DALY	1844
LEWIS B. WOODRUFF	1850†
JOHN R. BRADY	1856*
HENRY HILTON	1858
ALBERT CARDOZO	1863*
HOOVER C. VAN VORST	1868
GEORGE C. BARRETT	1869

* Elected to Supreme Court.

† Elected to Superior Court.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

CHARLES P. DALY, FIRST JUDGE.
 JOHN R. BRADY,
 ALBERT CARDOZO,
 HOOVER C. VAN VORST,†
 GEORGE C. BARRETT.

† Appointed to fill a vacancy.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
FOR THE
CITY AND COUNTY OF NEW YORK.

THE MASTER STEVEDORES' ASSOCIATION v. PETER H. WALSH.

The by-laws or pledge of an incorporated association of master workmen, subscribed by the defendant, provided that any member of the association found guilty by its committee of working for less prices than those fixed by the association, should forfeit to it twenty-five per cent. of the price fixed for the same work, the penalty to be collected in the name of the association by process of law: *Held*, on demurrer to the complaint, in an action by the association to collect such a penalty,

1. That such an association was not an unlawful combination to commit any act injurious to trade or commerce within the meaning of 1 Rev. Stat. 691, §§ 8, 9.

2. That such a by-law or pledge was not unlawful as made in restraint of trade.

3. That the by-law, being one which the association had the power to make, the association had also the power to attach to its violation a penalty, and an action might be maintained for its recovery.

Held further, that the word "forfeit," as used in the by-law, was not equivalent to a *forfeiture*, but meant a mere pecuniary penalty.

That it is not unlawful for any number of journeymen or master workmen to agree on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices; but any association or combination for the purpose of compelling journeymen or employers to conform to any rule,

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regulation, or agreement fixing the rate of wages to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs journeymen below certain rates, unless the journeyman pays the penalty imposed by the combination, or by menaces, threats, intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.

The grounds on which *People v. Fisher*, 14 Wend. 9, was decided, reviewed, and the rules governing trades-unions stated.

SPECIAL TERM, *January*, 1867.

THIS was a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The plaintiffs are a corporation of which the defendant is a member, and is, as its name imports, an association of master stevedores. The association adopted a by-law or "pledge" to the effect that there should be no variation from the prices adopted by the association, and that if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association twenty-five per cent. of the amount of such bill as fixed, which penalty might be collected in the name of the corporation by due process of law.

The complaint alleges that the by-law was subscribed to by the defendant, that the corporation had fixed the rate of discharging railroad iron from vessels at thirty-two cents a ton, and that the defendant had discharged fifteen hundred tons in violation of this regulation; that he was consequently found guilty by the association of working for less than the recognized price, and incurred a penalty of \$125, for the recovery of which the action is brought.

Joshua M. Van Cott, and *Emerson & Goodrich*, for the plaintiff.

C. C. Egan, for the defendant.

DALY, F. J.—The complaint is demurred to upon the ground that no action lies upon the facts stated, the specific objection raised by the demurrer being that the by-law is illegal, because

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the object it is designed to effect is one that is forbidden by law, and that no action can consequently be maintained upon it.

It is declared by the Rev. Stat. (vol. 1, p. 691, §§ 8 and 9), that it shall be unlawful for two or more persons to conspire to commit any act injurious to trade or commerce, and that the persons so conspiring shall be deemed guilty of a misdemeanor. In the *People v. Fisher* (14 Wend. 9), it was held that it was a violation of this statute for a body of journeymen shoemakers in the village of Geneva, in this State, to enter into an association for the purpose of preventing any shoemaker in the village from working below certain rates, which object the association sought to obtain by imposing a penalty of ten dollars upon any shoemaker in the village who worked for less, and by a mutual agreement among the members of the association that they would not work for any master shoemaker who should employ a journeyman who infringed their rules, unless the journeyman so infringing paid the ten dollars to the association, and which object was carried into effect by a number of the members of the association quitting the employment of a master shoemaker, who had employed a journeyman at rates below those which the association had agreed upon.

The feature which distinguishes this case from the one under consideration is, that coercive measures were there resorted to to compel a compliance, not only on the part of master shoemakers, but of journeymen not members of the association, with the regulations the combination had established. This was undertaking to interfere with the rights of others, and it has frequently been held that combinations to prevent any journeyman from working below certain rates, or to prevent master workmen from employing one except at certain rates are unlawful, and that the parties engaging in such combination may be indicted for a conspiracy (*Case of the Journeymen Cordwainers of the City of New York*, printed by J. Riley, New York, 1810. *Case of Journeymen Cordwainers of Pittsburg*, printed at Pittsburg, 1811. *Case of the Philadelphia Boot and Shoemakers*, Yates' Select Cases, 144. *The Philadelphia Journeymen Tailors' Case*, Phil. 1827, pp. 103, 160. *People v. Treguler*, 1 Wheeler's Criminal Cases, 142).

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In the present case, the by-law was limited in its operation to the members composing the corporation, and is sought to be enforced against one who had voluntarily subscribed to it. In this respect it is distinguished from the case of *The People v. Fisher*, and from the other cases above cited; but if all the reasons which Chief Justice Savage assigned for the judgment of the Court, in *The People v. Fisher*, are to be received as law, they would apply to this case.

They are substantially as follows: That any confederacy or united agreement among journeymen, for the purpose of raising their wages, is an indictable offense at the common law; that journeymen may each, singly, refuse to work unless they receive an advance of wages, but if they do so by preconcert or association, they may be punished for a conspiracy; that if the journeymen bootmakers of the village of Geneva, by extravagant demands enhance the price of labor at that place, boots made elsewhere may be sold cheaper, and it is, therefore an act injurious to trade, so far as respects the trade of the village of Geneva in that particular article, which is all that is necessary to bring the offense within the statute; that the best interests of society require that the price of labor be left to regulate itself, or be limited by the demand of it; that a combination or confederacy to enhance or reduce the price of it, or of any article of trade or commerce, is injurious; that without officious and improper interference, the price of labor will be regulated by the demand for it, but the right does not exist to enhance it by any fixed artificial means; that a mechanic is not obliged by law to work for any particular price. He has a right to say that he will not make a boot for less than a certain price, but he has no right to say that no other bootmaker shall make one for less. If one individual does not possess such a right over the conduct of another, no number of individuals can possess it. All combinations, therefore, to effect such an object are injurious, not only to the particular individual opposed, but to the public at large. That if journeymen bootmakers may say what boots shall be made for, it would be optional with them to say that \$10 or \$50 shall be paid, which would be a monopoly of the most odious kind; that if journey-

men can in this way fix their own wages, they would have the power to regulate the price of any manufactured article, and the community might be enormously taxed; that if the journeymen bakers should refuse to work except for enormous wages, and should compel all the journeymen bakers in a city to stop work, the community would be without bread. Such combinations would be productive of derangement and confusion, and if generally entered into would be prejudicial to trade and to the public interest; the truth being that they are wrong in every instance, as industry requires no such means to support it, competition being the life of trade.

Much of what is here said is undoubtedly right, and it is forcibly put. Many of the reasons were applicable to the case before the court, which was correctly determined in accordance with the adjudged cases. The objection, however, is, that some of the propositions stated are not tenable, and that there is an omission throughout, to distinguish between what is entirely lawful for either journeymen or master workmen to do in their collective capacity, upon the subject of wages, and those unlawful combinations where the object is to control the rate of wages by the use of coercive measures.

It is not, nor has it ever been, a rule of the common law that any mutual agreement among journeymen for the purpose of raising their wages, is an indictable offense, or that they are guilty of a conspiracy if, by preconcert and arrangement, they refuse to work unless they receive an advance of wages. The Chief Justice admitted that he had found but few adjudications upon the subject, and that the offense of conspiracy had been left in greater uncertainty by the common law than most offenses. He remarked that precedents in the absence of adjudications were some evidence of what the law is, and he referred to several, but none of them warrant the conclusion that they were founded upon any rule of the common law. He referred to but two adjudged cases: *The King v. The Journey-men Tailors of Cambridge*, 8 Modern, 11, and *The Tub Women v. The Brewers of London*, the last of which cases, he says, has been cited as sound law by all subsequent criminal writers. There is no report of any case under such a name of *The Tub*

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Women v. The Brewers of London. It is merely mentioned by name in the case first above cited, as authority for the proposition that a conspiracy of any kind is illegal, though the matter about which the parties conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it. The first volume of the Modern Reports, in which this reference is found, is one of the least reliable of the English reports, being full of inaccuracies, blunders, and misstatements. Burrows, in his reports, speaks of it as "a miserable, bad book," and says, that upon being cited, the Court of King's Bench treated it with the contempt that it deserved (1 Burr. 386; 3 id., 1326); and by an excellent authority upon the books of reports and their reporters, it is characterized by the epithet of execrable (Wallace's Common Law Reporters, 3 ed. p. 226). The title "*The Tub Women v. The Brewers of London*," is undoubtedly a mistake, and it has been conjectured that the case referred to is *The King v. Sterling and others*, reported in 1 Lev. 125; 1 Sid. 274; 1 Keb. 350. (See the conjectures of Mr. Emmett and of Mr. Sampson respecting it, in Yates' Select Cases, pp. 164, 211, 212). I entertain no doubt but that this conjecture is correct, and a brief statement of that case will suffice to show what was determined by it. The defendants—brewers of London—were found guilty of a conspiracy, for agreeing that they would brew no small beer—which was the drink of the poor—for a certain length of time, nor ale, except at a certain price, with the intent of moving the common people to pull down the excise-house and to bring the excisemen into public odium, that they might be impoverished and disabled from paying their rent to the government, to the diminution of the revenue; which was a very clear case of conspiracy, the design being to impair the public revenue, to inflict pecuniary injury upon all the excisemen, and to stir up a public tumult. Assuming it to be, as I have no doubt it is, the case referred to under the supposititious title of the "*The Tub Women v. Brewers of London*," it would have been more correct to have said that it warrants the conclusion that though the brewers, or any of them, had the right to cease brewing, or to raise the price of their ale, it was unlawful for them to combine to do

so for such an object as the one above stated. The case is an authority simply for a familiar principle of the criminal law, that it is a conspiracy to combine to do a lawful act for an unlawful purpose, or by unlawful means.

As respects the remaining case (*The King v. The Journey-men Tailors of Cambridge*), it is also found in this discredited volume of reports, in further condemnation of which I may cite the remark of an eminent English judge, Justice Wilmot, that, "nine cases out of ten in this book are totally mistaken" (*The King v. Harris*, 7 Term R. 238). But even the case, as reported there, affords no ground for the inference that there was any such rule at the common law as Chief Justice Savage supposed. In 1721, when the case was decided, there were acts of Parliament regulating the rate of wages. The defendants, according to the report, were indicted for refusing to work unless they received higher rates than the statute allowed. And, as far as can be gathered from the confused statement of the reporter, the conviction was held to be good, because they had conspired to raise their wages beyond what the law permitted. These early English statutes, regulating the price of labor, being wholly inapplicable to us in our colonial condition, were never in force in this country, and formed no part of the law of the Colony of New York, at the adoption of our State Constitution in 1777. This decision, therefore, was limited to England, deriving its whole effect from the English statute, the provisions of which it was held the defendants had conspired to defeat.

Chief Justice Gibson declared, in 1821, that it had never been decided in England that it was unlawful for journeymen to agree that they would not work, except for certain wages, or for master workmen to agree that they would not employ any journeymen, except at certain rates (*Commonwealth v. Carlisle*, 1 Hall's Journal of Jurisprudence for 1822, p. 225). And in corroboration of the statement of this very accurate and eminent jurist, I would add that I have examined down to the present time, and have found no case, either in this country or in England, in which any such decision has been rendered. In some of the elementary writers there are passages giving coun-

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tenance to such a doctrine, and there are some observations of judges to the same effect. Justice Gross said, in *The King v. Mawrey*, 6 Term R. 636, that in many cases an agreement to do a certain thing has been considered the subject of indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal; as in the case of journeymen conspiring to raise their wages, each may insist upon raising his wages if he can, but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy. But this was put simply by way of illustration, as there was no such question in the case, and was evidently made without examination, as no authorities are referred to; and in the case of the *Philadelphia Boot and Shoemakers*, Yates' Select Cases, 144, and in the case of the *Philadelphia Journeymen Tailors*, Phil., 1827, pp. 103, 160, Recorder Levy said that a single journeyman may refuse to work, but many journeymen jointly must not; but there the object of the combination was to coerce employers as well as third persons, and the point was not necessarily involved. In the *New York Cordwainers' Case*, *supra*, on the contrary, after an elaborate argument of the question, the court declared that they would not say that an agreement not to work except for certain wages would amount to a conspiracy, without unlawful means were resorted to to enforce it. This case was tried in this city in 1809. Justice Radcliffe, an eminent Judge of the Supreme Court, was on the bench, having associated with him another distinguished judge, Josiah O. Hoffman, and their united opinion upon such a question, after it had been learnedly discussed before them by four of the ablest counsel then in this State—Emmet, Colden, Griffin, and Sampson—is entitled to more consideration than the opinion, expressed by way of illustration, by Justice Gross, or the passing observation of Recorder Levy.

In the case of the *Philadelphia Journeymen Tailors*, printed at Philadelphia, 1827, Recorder Reed, upon a full examination of the subject, and after reviewing the opinion of his predecessor, Recorder Levy, held that an agreement among journeymen not to work unless they received certain wages,

where it did not extend beyond themselves, and where no other means were used, was not illegal, though it would be, if the object was to operate upon others not voluntarily entering into the agreement. Journeymen, he said, have an undoubted right, by an agreement among themselves, to regulate their own conduct, to ask as much as they please for their services; but the moment they undertake to interfere with the rights of others, or enter into combinations for such a purpose, the act is criminal and they become conspirators.

In the *Commonwealth v. Hunt* (4 Metc. 111), Chief Justice Shaw considered this question, and laid down the broad proposition that men are free to work for whom they please, or not to work if they so prefer, and that it is not criminal for them to agree together to exercise this right in such a manner as may best subserve their own interest; and in the case of the *Hartford Carpet Weavers*, tried before the Superior Court in Connecticut, in 1836, printed at Hartford, 1836, Chief Justice Williams told the jury that if the real nature of the agreement between the defendants was an agreement not to work below certain prices, that that was not an indictable offense, nor the subject of a civil action; that it had been so determined in that court, and under this ruling, the defendants were acquitted. This case is entitled to great weight. It was the third trial. A great deal of time was given to it, more than seventy witnesses having been examined. It was elaborately argued by counsel, and the ruling of the Chief Justice was made after the case had been considered upon appeal.

The absence of any adjudication upon this question at the common law may be attributable to the fact that there were statutes in England, from the passage of the Laborers' Act in the reign of Edward III., down to the reign of George IV., regulating the rate of wages, and forbidding agreements or combinations to evade these statutes; laws made in the interest of employers, in the creation of which those who were most affected by them had no share. By the Act of 5 Geo. IV. c. 95, all these statutes were repealed, and as this important statute was prepared with great care, its provisions may be appropriately referred to, both as indicating the state of common

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law, and as furnishing a good exposition of what the law ought to be upon this subject. It prohibits all persons from attempting by threats, intimidation, or violence, to force any workman to quit his employment, or to prevent him from hiring himself to, or accepting work from any person, or for the purpose of compelling him to join any club or association, or to contribute to any common fund, or to pay any fine or penalty for not doing so, or for refusing to comply with any regulations made to obtain an advance, or to reduce the rate of wages, or to lessen the hours of labor, or the quantity of work; but the act, at the same time, declares that it shall be lawful for any persons to meet together, for the sole purpose of consulting upon or determining the rate of wages, which the persons so assembling shall require or demand, or the hours or time they will work in their respective employments, and that they may enter into any agreements, verbal or written, among themselves, for the purpose of fixing the rate of wages which the parties so agreeing may demand, and that the persons so uniting and agreeing shall not be liable to any prosecution or penalty for so doing.

The distinction which this statute makes between the legality of associations among workmen for the protection of their interests, by agreeing as a body not to work below certain prices, and an illegal combination formed for the purpose of making it compulsory upon all the journeymen in a particular branch of business, and upon the employers to conform to certain prices by imposing penalties upon the journeymen in a city or town who refuse to do so, or by agreeing as a body not to work for any employer who will employ such a journeyman, or one who will not pay the penalty or become a member of the combination, or which seeks to accomplish such a purpose by violence, intimidation, or other unlawful means, is one that has been slowly arrived at in England, and toward which the courts in this country have been gradually approximating, for the reason that it has its foundation in the plainest principles of justice. The apprehension that if this be conceded, it would place employers wholly at the mercy of their workmen, who would have it in their power to exact any sum for their services, however ex-

travagant, is altogether an imaginary one. It is not possible, by any organization among journeymen, to bring about such a result. The history of English legislation upon the subject of wages, and of the operations of trades-unions, show that it is neither in the power of prohibitory laws nor of artificial combinations to control arbitrarily the price of labor, and that no combination can devise any general regulation or scheme that will bring to the same level the skillful and the incompetent, the diligent and the idle. All such matters regulate themselves. If labor is in demand, the rate of compensation will be enhanced in proportion; and if it is not, no combination among workmen can prevent the falling of prices. Voluntary associations among workmen, or agreements among them not to work except for certain prices, are effectual only when their demands are just and reasonable, and when they attempt any thing more, they not only fail of their object, but are themselves the chief sufferers. Workmen in every branch or calling are too universally diffused, too dependent upon their necessities, and too diverse in their interests, to make it possible by organization to accomplish any thing beyond this, for if those in any one place ask what is exceptionable or unreasonable, by the natural law of demand and supply, others will come in and take their places.

But it may be in their power to secure by associated effort what it would not be possible for any one of them to accomplish alone; and that they should have the right to associate together for the mutual protection of their individual interest is so plain, that it is singular that it should ever have been questioned. Journeymen may be as well acquainted as their employers with the causes which affect the price of labor, and in this country are generally well informed in such matters. They may be quite as well able to judge whether the ordinary profits of employers justify a reduction or an increase in the rate of wages. Why, then, should they not have the right to come together to consider the condition of the branch of industry in which they are operatives, to impart information to each other, to exchange their views, and discuss in a body a matter in which they are so deeply interested? Merchants meet daily

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upon 'Change, that they may be thoroughly informed upon all matters relating to the traffic in which they are engaged; and why should not journeymen meet together to consider and act upon a subject so important to them as the general rate of wages. The exact sum which should be required for a day's wages may be fluctuating and uncertain, through the operation of other causes than those of demand and supply, such as the instability of the currency, by which the value of the paper representative of a dollar changes as the circulating medium is increased or diminished. These are matters for the consideration of workmen as well as all other causes affecting the price of their labor; and if they come together, and as the result of their deliberations conclude that a certain rate would be just and reasonable, and that they will not work for less, it would be the height of injustice to call such an act a crime, by declaring that it was, in the language of the statute, unlawfully conspiring to commit an act injurious to trade or commerce, for which each of them may be indicted and punished.

It is better for the law to leave such matters to the action of the parties interested—to leave master workmen or journeymen free to form what associations they please in relation to the rate of compensation, so long as they are voluntary. They mutually act upon each other. If the workmen demand too much, or the masters offer too little, such a state of things cannot continue long, or be productive of any serious inconvenience to the community, as that party must ultimately give way whose pretensions are not founded in reason and justice (*Regina v. Harris*, 1 Carr. and Marsh. 662). It is otherwise, however, where organizations are formed to intimidate employers, or to coerce other journeymen; and it matters little what are the measures adopted, if the object of them is to interfere with the rights or control the free action of others. It was held, under the English statute I have referred to, that it did not authorize workmen to combine for the purpose of dictating to a master whom he should employ (*Rex v. Rykerdyke*, 1 M. and Kobs, 179); and the several convictions in this country have been in cases where coercive measures were resorted to, either to

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prevent master workmen from employing journeymen except at certain rates, or to intimidate journeymen from engaging below such rates, or to compel them to become members of the combination. Every man has the right to fix the price of his own labor—to work for whom he pleases, and for any sum he thinks proper; and every master workman has equally the right to determine for himself whom he will employ, and what wages he will pay. Any attempt by force, threat, intimidation, or other coercive means, to control a man in the fair and lawful exercise of these rights is therefore an act of oppression, and any combination for such a purpose is a conspiracy.

It may, therefore, be laid down as the result of this examination, that it is lawful for any number of journeymen or of master workmen to agree, on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation, or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeyman pays the penalty imposed by the combination, or by menaces, threats, or intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.

The act under which the defendants are incorporated (Laws of New York, 1863, p. 494), declares the object of the corporation to be "the better to promote the business and interests of the several members of the association," and a general power is given to make by-laws not inconsistent with the provisions of the act of incorporation, or of the laws of the State. There was nothing in the by-law inconsistent with the act of incorporation, or with the laws of the State. As individuals, the master stevedores might collectively enter into an agreement not to work under certain rates, and when formed into a corporation, they could, as a corporate body, make a by-law of that nature, being one, in the language of the statute, "to promote the business and interests of the association." If the by-law is

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one which it is in the power of the corporation to make, it has the power also to attach to it a penalty for the purpose of enforcing it. All who become members of the corporate body are bound by it, and where the penalty is incurred an action may be brought in the name of the corporation to recover it (*The Tobacco Pipe Makers v. Woodroffe*, 7 Barn. & C. 838; *King v. Clerk*, 1 Salk. 349; *Company of Feltmakers v. Davis*, 1 B. & P. 100; *Vinters' Company v. Passy*, 1 Burr. 239, 250; *Guardians of Trinity House v. Crispin*, T. Jones R. 144; *Leathy v. Webster*, Sayre, 251; Grant on Corporations, 76, 78, 82, 86, 87). The proper mode of enforcing a by-law is by a pecuniary penalty, for the corporation cannot, either directly or indirectly, impose any forfeiture of goods, or of stock, or other corporate interests for the breach of it (*Matter of the Long Island Railroad Company*, 19 Wend. 37), and the penalty must be certain (*Leathy v. Webster*, *supra*). The words of the by-law are, that the party shall forfeit to the association twenty-five per cent. of the amount of such bill as fixed by the association, *which penalty* may be collected by due process of law. Though the word forfeit is used, this is not a forfeiture (Grant on Corporations, 84, 85, 303), but a pecuniary penalty, and it is sufficiently certain.

This was not a by-law in restraint of trade, for it imposes no restraint upon one party which is not beneficial to the others, and is not, as has been shown, prejudicial to the interests of the public (*Chappel v. Brockaway*, 21 Wend. 157; *Lawrence v. Kidder*, 10 Barb. 641). The demurrer must be overruled, with costs.

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CHARLES T. CROMWELL v. THOMAS STEPHENS *and others.*

The plaintiff's building was a large structure, eight stories in height, those above the basement being exclusively used as lodgings for single persons at a fixed rate per night. There were no arrangements for boarding or cooking for guests, nor was there any bar or restaurant belonging to or connected with the plaintiff's occupation of the building. The Croton water during half of the day did not usually rise above the basement of the building, owing to the deficiency of the supply, and was not supplied throughout the whole building.

Held, That such a structure is not that kind of a house for the general reception of travelers which in this country is known as a "hotel," and is not, therefore, strictly within the ordinance fixing the water tax payable by "hotels."

Although the uses to which a building is applied may not, either in the legal or in the popular acceptance of the term, make it a *hotel*, it may still be deemed one in the sense of an ordinance regulating the rate to be paid for the supply of Croton water, if it is apparent that it is a kind of establishment for which the ordinance meant to provide.

It seems, therefore, that a lodging house, freely supplied with water, would come within the intention of such an ordinance. *But held*, That the plaintiff's structure, not being thus supplied, it was not chargeable with the extra tax "as a hotel," for each lodging room.

The legal definitions of "inn," "hotel," and "boarding house," compared.

An injunction will be granted to restrain the Croton Aqueduct Board of the City of New York from cutting off the Croton water from the plaintiff's building, on the ground of non-payment of the water rate, where the rate charged by them, and for non-payment of which they claim to stop the supply, is more than is authorized by law.

SPECIAL TERM, *June*, 1867.

THIS was an action brought to restrain the defendants, who compose the Croton Aqueduct Board, from stopping the supply of Croton water to a building owned by the plaintiff.

The plaintiff moved for a preliminary injunction, the grounds of the motion appearing in the opinion of the court.

Charles J. Cromwell, in person, for the motion.

Richard O'Gorman (Corporation Counsel), opposed.

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DALY, F. J.—This is an application for an injunction to restrain the Croton Aqueduct Board from cutting off the Croton water from a large building at the corner of Frankfort and William streets, owned by the plaintiff, which is used as a cheap lodging-house.

The ordinance of the city corporation, establishing the rate of water rents, provides that hotels and boarding houses shall, in addition to the regular rate for private families, be charged for each lodging room, at the discretion of the Croton Aqueduct Board. The Board, upon the assumption that the plaintiff's building is a hotel, have imposed an additional tax of \$180 annually. The plaintiff insists that it is not a hotel, and has refused to pay the additional tax, in consequence of which the Board have notified him that they will, if it is not paid, cut off the Croton water from the building; and the present application is to stay them from carrying that resolution into effect.

It appears that the building is a large structure of eight stories, each story consisting of lodging rooms, adapted to the use of one person only, and above the basement it is used exclusively as a lodging-house; that the rooms are very small, being from four to six feet wide and eight feet long; that they are intended for poor people, being let at the small rate of twenty-five cents per night, and the water used in each room does not exceed, upon an average, a pint a day, whereas the rooms in ordinary hotels are four times as large, can be occupied by four times as many persons, and the water used in such rooms is ten times greater; that there is not a sufficient supply of Croton water above the first floor; that four-fifths of the time it does not rise above that floor; that between seven o'clock in the morning and six in the evening there is no supply above the basement, and it could not be obtained between these hours for the use of the floors above, unless it was carried up from the floor below, at a great expenditure of time and labor; that the water for the supply of the rooms, and for cleaning and ordinary use, above the second floor, is supplied by a huge tank, which the plaintiff has caused to be erected at his own expense in the attic, into which the rain-water flows that falls upon the roof; that there is no cooking for guests, the house above the

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basement being adapted only for sleeping in, and not one-quarter as much water is used by each individual as would be used in a private house with the same number of people; that upon an average sixty-five out of the one hundred and eighty rooms are untenanted, and yet the rate imposed by the Board is for one hundred and eighty rooms; that there is no bar or place for drinking or entertainment attached to the premises, or connected with its occupation; there is a restaurant and a barber's shop in the basement, but each of them pays separately for the supply of Croton water which it receives.

This being the character of the building and of the uses to which it is applied, the question presented, and the only one discussed upon the motion, is whether it is a "hotel;" a question the solution of which depends upon the meaning of that term.

Ordinarily, in a legal inquiry, it is sufficient to refer to some approved lexicographer to ascertain the precise meaning of a word. But this is a word of wide application, and as the meaning which is to be attached to it in this country, has been the subject of much discussion upon the argument, it may be well to refer to its origin and past history, as one of the means of determining its exact signification. The word is of French origin, being derived from *hostel*, and more remotely from the Latin word *hospes*, a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another, as well as the master of a house who entertains travelers or guests. Among the Romans it was a universal custom for the wealthier classes to extend the hospitality of their house, not only to their friends and connections when they came to a city, but to respectable travelers generally. They had inns, but they were kept by slaves, and were places of resort for the lower orders, or for the accommodation of such travelers as were not in a condition to claim the hospitality of the better classes. On either side of the spacious mansions of the wealthy patricians were smaller apartments, known as the *hospitium*, or place for the entertainment of strangers, and the word *hospes* was a term to designate the owner of such a mansion, as well as the guest whom he received (Andrew's Lex.)

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This custom of the Romans prevailed in the earlier part of the middle ages. From the fifth to the ninth century, traveling was difficult and dangerous. There was little security except within castles or walled towns. The principal public roads had been destroyed by centuries of continuous war, and such thoroughfares as existed were infested by roving bands, who lived exclusively by plunder.

In such a state of things there could be little traveling, and consequently the few inns to be found were rather dens to which robbers resorted to carouse and divide their spoils, than places for the entertainment of travelers (*Historie des Hotelleries, Cabarets, &c., par Michel et Fournier, Paris, 1851, p. 181*). The effect of a condition of society like this was to make hospitality not only a social virtue but a religious duty, and in the monasteries, and in all the great religious establishments, provision was made for the gratuitous entertainment of wayfarers and travelers. Either a separate building, or an apartment within the monastery, was devoted exclusively to this purpose, which was in charge of an officer called the hostler, who received the traveler and conducted him to this apartment, which was fitted up with beds, where he was allowed to tarry for two days, and to have his meals in the refectory, while, if he journeyed upon horseback, provender was provided by the hostler for his beast in the stables (*Fosbroke's Monachism, 238, 3d ed. ; Davies, 2, 769*). In many countries this apartment, or guest hall, of a monastery retained the original Latin name of *hospitium*, but in France the word was blended with *hospes* and changed into *hospice*, and it afterward underwent another change. As civilization advanced, and the nobility of France deserted their strong castles for spacious and costly residences in the towns, they erected their mansions upon a scale sufficiently extensive to enable them to discharge this great duty of hospitality, as is still, or was very recently, the custom among the nobility and wealthier classes in Russia, and in some of the northern countries of Europe. Borrowing, by analogy, from an existing word, and to distinguish it from the guest house of the monastery, every such great house or mansion was called a *hostel*, and by the mutation and attrition to which these words

are subject in use, the *s* was gradually dropped from the word, and it became *hôtel*. As traveling and intercourse increased, the duty upon the nobility of entertaining respectable strangers became too onerous a burden, and establishments in which this class of persons could be entertained by paying for their accommodation sprung up in the cities, towns, and upon the leading public roads, which, to distinguish them from the great mansions or hotels of the wealthy, and at the same time to denote that they were superior to the *auberge* or *cabaret*, were called *hostelleries*, a name which has been in use in France for several centuries, and is still in use to some extent as a common term for inns of the better class, while the word *hotel*, in France, has long ceased to be confined to its original signification, and has become a word of a most extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction, or of celebrity. It is applied to a hospital, as *Hôtel Dieu*; or to a town hall, as *Hôtel de Ville*; to the residence of a judge, to certain public offices, and to any house in which furnished apartments are let by the day, week, or month (Roquefort, *Etymologique Français*, Paris, 1829; *Dictionnaire de l'Académie Française*, 1798, et *Complement au Dictionnaire*; *Bescherelle, Dictionnaire Français*).

The word, though so long in use in France, is of comparatively recent introduction into the English language. The Saxon word *inn*, was employed to denote a house where strangers or guests were entertained, down to the time of the Norman invasion; and, under the Norman rule, it was, in the popular tongue, the word for the town houses in which great men resided when they were in attendance on court, several of which became afterward legal colleges, under the well known titles of inns of court (Pearce, 50). In all legal proceedings, however, and wherever the Norman French was spoken, the word *hostel* was the term for all such establishments. The places where entertainment could be procured for a compensation, to distinguish them from the inns, or great houses, where it was furnished gratuitously, were called in English common inns; while in Norman French, by a change analogous to that which had occurred in France, they were called first *hostelleries*, and

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afterward *hostries* (Year Books, 42 E. iii. 11; 22 H. vi. 38; Statutes, 5 E. iii. c. xi.; Fitzherbert's Abm. p. 2, 28; Brooke's Abm. p. 4, 15; Dyer R. 158, a note; Godb. R. 347; Kelham's Norman Dicty.; Law French Dicty. 1701). To "host," was to put up at an inn; and "hostler," before referred to as the title of the officer in the monastery who was charged with the entertainment of guests, was the Norman word for innkeeper, and was in use until about the time of Elizabeth, when, the keeping of horses at livery becoming a distinct occupation, it was the term for the keeper of a livery stable (Yelv. R. 67; Cooke's Entr. 347), and afterward of the groom who has charge of the stables of an inn (Calve's case, 8 Co. 32; Bailey's Dictionary).

It appears from a note of Malone, referred to in Todd's edition of Johnson's Dictionary, that the word hotel came into use in England by the general introduction in London, after 1760, of the kind of establishment that was then common in Paris, called an *hôtel garni*, a large house, in which furnished apartments were let by the day, week, or month. In Barclay's Dictionary, 1872, in the first edition of Walker, 1791, and in Sheridan's Dictionary, 1795, hotel is given as the proper pronunciation of *hostel*, an inn; and in the dictionaries of Jones, 1798, and of Perry, 1805, it is incorporated as an English word, and is defined in the latter to be "an inn, having elegant lodgings and accommodations for gentlemen and genteel families." Todd, 1814, defines it to be "a lodging-house for the accommodation of occasional lodgers, who are supplied with apartments hired by the night or week." The definition given by Knowles, 1835, is simply "a lodging-house." By Smart, 1836, "a lodging-house or inn." Beid, 1845, "an inn or a lodging-house." Boag, 1848, "an inn;" and by Dr. Latham, in his edition of Johnson's Dictionary, "an inn of a superior kind."

The word was introduced into this country about 1797. Before that time houses for the entertainment of travelers in this city were at first called inns, and afterward taverns and coffee-houses. In 1794, an association, organized upon the principle of a tontine, erected in Wall street what was then a very superior house for the accommodation of travelers, called the Tontine Coffee-house; the success of which led to the formation of

another company for the erection of one upon a still more extensive scale in Broadway. This structure, which was called the Tontine Tavern, was built about 1796, upon the site of what had been a famous tavern or coffee-house in colonial times, and from the extensive accommodation it afforded, and the superior character of its appointments, it was then, and for many years afterward, the most celebrated establishment of the kind in the county. There was at that period a rage for every thing French. The city was filled with refugees from France and from the French West India possessions, whose residence among us produced a great change in our social habits, amusements, and tastes (Watson's Annals, 209), while a fierce party strife prevailed between those who advocated the principles of the French Revolution and those who condemned them. The French national airs were sung in the streets; men mounted the tri-color cockade; and the proprietors of the new tavern, falling in with the popular current, gave a French name to their establishment, by changing it from the Tontine Tavern to the City Hotel. The new word was afterward adopted by the proprietors of other houses for the entertainment of travelers in this and neighboring cities, and, becoming general, found its way into American dictionaries. Allison, one of the earliest of American lexicographers, 1813, defines it to be "an inn of a high grade, a respectable tavern." Webster calls it "a house for entertaining strangers or travelers," and says that "it was formerly a house for genteel strangers or lodgers," but that "the name is now (1840) given to any inn." Worcester's definition (1846) is "a superior lodging-house with the accommodations of an inn; a public house; a genteel inn; an inn," and in the last edition of Webster, 1864, there is given an addition to the previous general definition: "An inn; a public house, especially one of some style or pretensions."

It is to be deduced from the origin and history of the word, and the exposition that has been given of it by English and American lexicographers, that a hotel, in this country, is what in France was known as a *hotellerie*, and in England as a common inn of that superior class usually found in cities and large towns. A common inn is defined by Bacon to be a house for

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the entertainment of travelers and passengers, in which lodging and necessaries are provided for them and for their horses and attendants. (Bac. Abm. Inns, B.) In *Thompson v. Lacy* (3 B. & A. 283), Justice Bayley declares it to be "a house where a traveler is furnished with every thing which he has occasion for while upon his way," and, in the same case, Best, J., says it is "a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." But a more practical idea of what was understood at the common law as common inns, may be gathered from Hollingshed's description of them, as they existed in the days of Elizabeth. "Every man," says that quaint chronicler, "may in England use his inn as his own house, and have for his monie how great or how little varietie of vittals and whatsoever service himself shall think fit to call for. If the traveler have a horse, his bed doth cost him nothing, but if he go on foot, he is sure to pay a pennie for the same. Each comer is sure to be in clean sheets wherein no man hath been lodged since they came from the laundress, or out of the water wherein they were ywashed. Whether he be horseman or footman, if his chamber be once appointed, he may carry the key with him as of his own house as long as he lodgeth there. In all our inns we have plenty of ale, biere, and sundrie kinds of wine; and such is the capacity of some of them that they are able to lodge two hundred or three hundred persons and their horses at ease, and with very short warning (to) make such provision for their diet as to him that is unacquainted withall may seem to be incredible" (Hollingshed's Chronicle—Description of England). And another observer (Fynes Moryson), writing before 1614, adds: "If the traveler eats with the host or at the common table his meals cost him sixpence, and in some places fourpence; but if he will eat in his chamber he commands what meat he will, and the kitchen is open to him to order the meat to be dressed as he likes best" (The Itenerary, pp. 111–151).

In the above-mentioned case of *Thompson v. Lacy*, the defendant kept a house in London called the Globe Tavern and

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Coffee-house, where he furnished beds and provisions to those who applied. No stage, coaches, or wagons stopped there, nor were there any stables belonging to the house. The question was whether this was an inn, and it was held that it was. "The defendant does not charge," said Best, J., "as a mere lodging-house keeper, by the week or month. * * * A lodging-house keeper, on the other hand, must make a contract with every man that comes, whereas an inn-keeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price." In *Doe v. Lansing* (4 Camp. 76), decided before the above, Lord Ellenborough held that a coffee-house in London, where persons from the country lodged, was not an inn; and in an earlier case (*Parkhurst v. Foster*, 1 Salk. 387), it was held that an establishment at a watering-place, where persons were taken to lodge, in which dressed meat was furnished to them at fourpence per joint, and small beer at twopence per mug, and to whom stables were let to their horses, was not an inn. Neither of the cases are fully reported, and if maintainable, it must be upon the ground that these were not houses for the general reception of travelers, but places where either a lodging or certain articles of food, or the stabling of a horse, could be procured by paying for each, in contradistinction to the general entertainment which an inn supplied to all travelers or guests at a reasonable charge. In *Darsey v. Richardson* (3 Ellis & Bl. 144), it was held that a boarding-house was not an inn, the distinction being put upon the ground that a boarder being received into a house is owing purely to a voluntary contract, whereas an inn-keeper, in the absence of any reasonable or lawful excuse, is bound to receive the guest when he presents himself. "The inn-keeper," said Coleridge, J., in *The King v. Ivens* (7 C. & P. 213), "is not to select his guests. He has no right to say to one you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received;" inn-keepers, he said, being a kind of public servants, having the privilege of entertaining travelers, and of supplying them with what they want. In *Seward v. Seymour* (Anthon's Law Student, 51), it was held that a well-known establishment

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which formerly existed in this city, called the Atlantic Hotel, had a double character, being both a boarding-house and an inn; that in respect to those who occupied rooms and were entertained under precise contracts, it was a boarding-house, while with respect to transient persons, who, without any stipulated contract, remained from day to day, it was an inn; and this definition of an inn was substantially given by Chief Justice Oakley in *Wintermute v. Clarke* (5 Sandf. 247), as a house "where all who come are received as guests, without any previous agreement as to the duration of their stay, or as to the terms of their entertainment." In *Willard v. Reinhard* (2 E. D. Smith, 148), the distinction between a boarding-house and an inn was declared to be this: in a boarding-house the guest is under an express contract, at a certain rate for a certain period of time, but in an inn there is no express engagement, the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract. And in *Carpenter v. Taylor* (1 Hilt. 195), it was held that a restaurant, to which a person resorts for the temporary purpose of obtaining a meal, is not an inn. "On the contrary," said Ingraham, J., "as the customs of society change and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes. Mere eating-houses cannot now be considered as inns. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers, and though the defendant may carry on in another part of his premises the business of an inn-keeper, it does not follow that the liability for that part of the premises is to be extended to the whole. To which it may be added, with equal force, that a mere lodging-house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn.

It follows from these authorities, that an inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate

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of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. This, as accurately as I am able to state it, is the legal definition of an inn, and this is exactly what is understood in this country by a hotel. It is customary, especially in our cities, to let out furnished apartments in houses, by the week or by the month, without meals, or with breakfast simply; but we do not, as the French do, call such houses hotels, but merely lodging-houses (Worcester's and Webster's Dictionaries). We have in the cities houses of entertainment, in which the guest or traveler pays so much per day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it. Where the restaurant forms a part of the establishment, and the house is kept under one general management for the reception of all travelers or guests that may come, it is an inn, there being no material difference between it and the Elizabethan inn, in which the traveler paid separately for his apartment and for each meal. It differs from a boarding-house, for the reason that all who come are received, and because the guest engages for no specific period, but pays only for the time he is there. x

In *Smith v. Scott* (9 Bing. 14; 2 Moo. & S. 35), it was held that a woman who kept a house without any public sign, in London, in which she let rooms to families or single men for long or short periods, and, if required, found cooked provisions for them, upon which she charged a small profit, receiving her orders usually every Monday and her payment at the end of the week—the house being open at all hours to any person who came—was a hotel-keeper, within the meaning of the Bankrupt Act of 6 Geo. IV., ch. 16, § 2, which enumerates “victualers, keepers of inns, taverns, hotels, and coffee-houses,” as among the classes of persons who may be declared bankrupt. C. J. Tindall put the decision upon the ground that some distinction must have been intended, as the word which immediately precedes hotel in the act is inn, and that it could scarcely have been intended to designate the same thing by both words. He was of opinion that hotel was not used in the sense of the old word

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hostel, "for that," he said, "means what is now termed an inn." "The modern word," he remarked, "was introduced from the French, and rather implies a house to which people resort for lodging than for the sort of entertainment which is to be procured only at an inn;" and Gaselee, J., said that there might have been a doubt if the party had only received lodgers occasionally, but as the house was open to any comer, and all who frequented it were supplied with provisions to some extent, he regarded it as a hotel. It is sufficient to say in respect to this case, that it may be that in London the word hotel is not applied to an inn; that there it has undergone no change, but still is limited to the signification which it originally had when introduced there. Such is not, however, the case in this country, where the word has been long in popular use to designate what in the law is denominated an inn.

I have discussed the meaning of this word closely, for the reason that it is an embarrassing question whether the building owned by the plaintiff is, or is not, a hotel. As contradistinguished from a boarding-house, it is public in its character, being open to all comers, and two of the principal wants supplied by an inn, lodging and meals, can be obtained there; but not under any general arrangement, as the restaurant is kept by one person and the lodging-house by another. The proprietor of the restaurant does not engage to provide lodgings for those who come to his restaurant for entertainment, and the keeper of the lodging-house lets out his rooms for twenty-five cents a night, without any stipulation, express or implied, to furnish those who take them with meals. Each is independent of and has no control over the other, and neither, in his separate capacity, could be regarded as the keeper of an inn, liable to that extraordinary responsibility for the safe keeping of the property of guests, which the law imposes upon that class of bailees. If the cases to which I have reference (*Parkhurst v. Lansing*, 1, *Salk*. 387, and *Doe v. Lansing*, 4 Camp. 76), were correctly determined, it is not an inn, and in the best view I can take of it, though the point is not free from doubt, it is not that kind of house, for the general reception of travelers, which in this country is known as a hotel.

But though the uses to which the building is applied may not, in the legal or in the popular acceptance of the term, make it a hotel, it might still be deemed one in the sense of an ordinance regulating the rate to be paid for the supply of Croton water, if it were apparent that it was a kind of establishment for which the ordinance manifestly meant to provide. A huge lodging-house, supplied from roof to cellar, would consume as much water, and should be required, as well, to pay proportionally for the use of it, as a smaller building coming strictly within the definition of a hotel. The whole design of the ordinance was to regulate the tax according to the consumption, and for this purpose hotels and boarding-houses, in addition to the rate paid by private families, are to be charged for each lodging-room, and it is left to the discretion of the Croton Aqueduct Board to determine what the charge per room shall be. There are 180 lodging-rooms in the plaintiff's building, and the Board have imposed an annual tax of \$180, or \$1 for each room. It is but a just interpretation of the ordinance, however, to suppose that the design of it was that each lodging-room supplied with water in such an establishment, should be separately charged for, and not that a tax should be imposed where water cannot be supplied. During one-half of the twenty-four hours the Croton water does not rise beyond the basement of the plaintiff's building, in consequence of the number of mechanical and other establishments in this particular locality, which, throughout the day, drain and greatly diminish the supply. Unable to procure, by the ordinary flow of the aqueduct, what is required for the lodging-rooms above the first floor, the plaintiff, as already stated, has been compelled to build a tank to receive the rain water from the roof, obtaining by that means what could not be obtained from the supply of the aqueduct. While, therefore, I am disposed to think that a large lodging-house, to which water is freely supplied, would come within the intention of the ordinance, I am of the opinion that the plaintiff's building does not. It is not strictly within the words of the ordinance, as it is not what is popularly known as a hotel, and it is not such an establishment as could have been contemplated by it, as it is not to be supposed that there was an intention to tax a man for all the

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lodging-rooms of a building if water could not be supplied to them, and he is compelled to obtain it elsewhere. It is a case, in my judgment, coming under the portion of the ordinance which provides that matters not mentioned are to be arranged by a special contract, and not under the one which imposes a charge upon each lodging-room. I shall, therefore, grant the injunction. •

IN THE MATTER OF PAUL ANDRIOT, AN IMPRISONED DEBTOR.

In an application for a discharge under the act to abolish imprisonment for debt, it must appear by the defendant's petition either that a suit had been commenced, or a judgment recovered, against him by the prosecuting creditor.

A schedule, setting forth an account of the petitioner's estate, as it existed at the time when he was committed under the act, is defective. It should contain an account of his estate as it existed at the time of his *arrest*. But the officer to whom the application is made can allow the schedule to be amended in this respect, if satisfied that the omission was unintentional, or arose from a misconception of the statute.

If an application is made for a discharge within the thirty days allowed, and is denied upon the merits, it cannot be renewed. Whether, if denied for defect of form, it may be renewed before another officer, *query?*

If the petitioner has been committed under the act for fraudulently disposing of his property, he cannot be discharged from imprisonment by making the assignment of his property, provided for by the sixteenth section of the act. The fraudulent disposition of property referred to in this section, is not a fraudulent disposition between the time of his conviction and the application for a discharge from imprisonment. This provision for a discharge applies only to cases where there has been no fraudulent concealment, removal, or disposition of property by the debtor with intent to defraud creditors. The object of the act was humane and remedial; to relieve from imprisonment the honest but unfortunate debtor, who had no longer the means of satisfying his creditors, and a certain class of fraudulent debtors were excepted from its operation, who may be relieved under the Code, in cases of inability to endure the imprisonment, or to perform the act required, upon such terms as may be just.

Review of the history of legislation for the relief of debtors, and of the state of the cases anterior thereto.

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The petitioner, Andriot, having been convicted, under the act to abolish imprisonment for debt or to punish fraudulent debtors, of disposing of his property with intent to defraud his creditor, and committed to prison, presented his petition to be discharged from imprisonment upon making an assignment of all his property under the sixteenth section of the act. All the material facts will be found in the opinion denying the application.

DALY, F. J.—The petition of the applicant sets forth that, being a prisoner, confined in the city prison of this city, under a commitment granted by me in certain proceedings had before me on behalf of Wilson G. Hunt and others, under the provisions of the act to abolish imprisonment for debt, and to punish fraudulent debtors, and having given the bond specified in the fourth sub-division of the fourth section of that act, he asks for such relief as he believes himself entitled to, pursuant to the provisions of the said statute, having complied with the provisions of the same, adding the usual prayer for an assignment of his estate, and a discharge pursuant to the act; and his petition is accompanied with an account of his creditors and an inventory of his estate, as the same existed at the time of his imprisonment. This petition is defective in not setting forth sufficient to give an officer jurisdiction to hear the application and grant a discharge, unless it may be supposed that I can take judicial notice of the proceedings formerly had before me. It was held by the Court of Appeals, in *The People v. Bancker* (1 Selden, 107), that whether the application is made after a suit has been commenced against the debtor, in which, by the provisions of the act, he cannot be arrested or imprisoned, or is made in pursuance of the bond given to avoid commitment, or is made after the debtor has been committed, that in either and all of these cases it must appear that the debtor has been proceeded against for the collection of a debt or demand arising upon contract, for which he could not be arrested or imprisoned, according to the provisions of the act, and that the petition must show affirmatively the nature of the suit or judgment. In effect, that it must appear that the suit or judgment was one in which the debtor could not have been arrested or imprisoned under the act. All that appears in the petition here is, that Andriot was

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committed by me to the city prison, in certain proceedings had before me, on behalf of Wilson G. Hunt and others, under the act to abolish imprisonment for debt ; and that after he was committed he gave the bond, under the fourth sub-division of the fourth section, conditioned that he would apply for an assignment and discharge within thirty days. Whether a suit was commenced, or a judgment was obtained by Hunt and others, without which I could not have acquired jurisdiction to commit him to prison as a fraudulent debtor, is not stated. In *The People v. Bancker*, the fact that a suit had been commenced against the debtor by the prosecuting creditor, was set forth by the petition, but it was held to be insufficient, because it did not disclose the nature of the suit. Here there is no mention even of the commencement of a suit, or the obtaining of a judgment, to authorize the arrest and commitment ; nothing but the general statement that certain proceedings were had under the act to abolish imprisonment for debt. Clearly, if this petition was before another officer than myself, he would be bound, under the authority cited, to dismiss it ; and I do not deem it necessary to inquire how far I have the power to take notice of matters that have officially taken place before me, inasmuch as I shall be compelled to dismiss this application upon other grounds. It was further held, in the case cited, that the inventory to be annexed to the petition, must contain an account of the petition, with real and personal, and of all charges affecting the same, both as such estate existed at the time of his arrest, and as they exist at the time of preparing the petition. The inventory here is defective in this respect. It merely sets forth his estate and the charges existing upon it, at the time of his imprisonment. The imprisonment referred to in his petition is his imprisonment in the city prison, under the commitment I granted. This arrest was anterior to that period, and the inventory is, therefore, defective in not setting forth his estate and the charges upon it as it existed at time of his arrest, and as it existed when he prepared his petition. The former is not stated at all, and the latter is left to be inferred. It has been the practice of the judges of this court when proceedings of this kind have been instituted before them individually, and of other judges in this city, upon the authority of

Brodie v. Stevens (2 Johns. 389), to allow the schedules to be amended, unless they were satisfied that the omission was unintentional or rose from a misconception of the requirements of the statute. But an amendment of the schedules here would not avail the petitioner, there being other objections to his right to be discharged. It is objected that he did not make the present application within thirty days. Within that time, to wit, on the 27th of July, he made his application for a discharge, which was denied. When the present application was made, the thirty days had expired. In *People v. Aikin* (4 Hill, 606), the debtor, to avoid a commitment, offered to make an assignment of his property, and delivered to the officer an inventory and account, pursuant to section ten, sub-division three. His application was opposed by the creditor, and after hearing the proofs and allegations of the parties, the officer decided that the debtor's proceedings had not been just and fair, inasmuch as he had concealed, removed, and disposed of a portion of his property, with intent to defraud his creditors, and he refused to grant a discharge. He then made another application to a different officer, who dismissed it upon the ground that the matter had been heard and adjudicated upon, and the debtor applied to the Supreme Court for a mandamus, which was denied, that Court holding that the matter having once been decided against him, it was *res adjudicata*; and that he was estopped from trying it a second time as long as the first decision remained unreversed, his remedy being to review that decision, if it was erroneous, by *certiorari*. The ground upon which the judge of this court dismissed the application before him does not appear. The objections that are now made by the creditors were made then, and it seems he dismissed it, generally, without specifying any particular ground. If he denied the petitioner's application upon the merits, the case of the *People v. Aikin* is expressly in point, and if he denied it merely from defect of form, I am not prepared to say that the petitioner had a right to make another application after the thirty days had expired. It has been customary, as I have stated, where the prosecuting creditor or creditors appear in pursuance of the notice, to permit an amendment for defect of

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form ; but if the application is dismissed, I very much doubt if the debtor can renew it after the thirty days. It is not necessary, however, that I should put my decision upon this ground, the creditors having taken another objection to the discharge, which I regard as conclusive. The sixteenth section of the act provides that the discharge shall not be granted, if the opposing creditors shall satisfy the officer that the debtor has assigned, removed, or disposed of his property with intent to defraud his creditors, and the opposing creditors have put in evidence here the proceedings in which I convicted the defendant of having fraudulently disposed of his property. It is insisted, however, that the fraudulent disposition contemplated by the statute, is a disposition of property by the debtor during the time that elapses between his conviction and his application for a discharge. That though convicted of having made a fraudulent disposition of his property, he is still entitled to the benefit of the act, unless it is shown that he has assigned, removed, or disposed of property, with intent to defraud, after his conviction. Such a construction was put upon the act of Judge Ulshoeffer, in the case of *Bragg v. Underhill*, but with every respect for the opinion of my late associate, I cannot agree with him. I do not so read the statute. It declares explicitly that the officer shall not make the order for the assignment, unless the opposing creditors shall fail to satisfy him that the proceedings on the part of the petitioner are not just and fair, or that he has not concealed, removed, or disposed of any of his property with intent to defraud his creditors; and in the affidavit which the debtor is bound to annex to his petition, he is required to swear that he has not, at any time nor in any manner, disposed of or made over any part of his property, with a view to the future benefit of himself or his family, or with an intent to injure or defraud any of his creditors. The part of the statute relied upon by the petitioner as warranting the construction he put upon it, is the general provision in section ten, declaring that a commitment shall not be granted if the debtor shall do any of the things prescribed. Among them, deliver to the officer an inventory of his estate, and an account of his creditors, and execute an assignment or give a bond with

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sureties, conditional that he will apply in thirty days for an assignment of his property and a discharge; and the provision in section twelve, authorizing him, after his commitment, to present a petition praying for an assignment of his property, and that he may have the benefit of the act. But these provisions must be taken in connection with the subsequent one in section sixteen, which, as already stated, declares that the discharge is not to be granted if the debtor has concealed, removed, or disposed of his property, with intent to defraud, and such a construction is to be given as will make them harmonious with each other. When the fraud imputed to the debtor has been substantiated, he may avoid a commitment by paying the debt, or by giving security that it will be paid within sixty days, or if unable or unwilling to do either, by assigning his property for the benefit of the prosecuting creditor or creditors (*Berthelon v. Betts*, 4 Hill, 577; *Spear v. Wardell*, 1 N. Y. 144), or by giving a bond that he will apply for such an assignment within thirty days; or, after commitment, he may petition that his property may be assigned, &c. But this provision must be understood as applying only to cases where there has been no fraudulent concealment, removal, or disposition of property by the debtor, as where he has been adjudged guilty of, or has been committed for, fraudulently contracting the debt, or of unjustly refusing to apply property to the payment of a judgment or decree, or of being about to remove his property beyond the jurisdiction of the court, or to dispose of it with intent to defraud his creditors. Where, however, he has been adjudged guilty of concealing it, or of removing or disposing of it with such an intent, he comes directly within the prohibition of section sixteen, and cannot obtain the benefit of the act. That this is the true intent of the statute, I have not the slightest doubt, and such was the opinion of Chief Justice Savage in *Townsend v. Morrell* (10 Wend. 582). After adverting to the right of the debtor to apply for a discharge, he says: "This mode of avoiding imprisonment can only be efficacious where no actual fraudulent disposition or concealment of the property has been made by the debtor, for the officer is not to grant a discharge unless he shall be satisfied that the proceedings on the part of the debtor have been just

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and fair, and that he has not concealed, removed, or disposed of his property, with intent to defraud his creditors; or, rather the opposing creditor must have failed to prove these charges. This relief, however, may be applied where the debtor has been convicted only of the intention to commit a fraud, as under the first subdivision of the fourth section. The same remarks are applicable to the fourth subdivision of section ten, by which a bond is to be given, the condition of which must be that the debtor will in thirty days apply for his discharge, and prosecute his application diligently until he obtains it." *Clarke v. Wright* (10 Wend. 584) is still more in point, for it would seem from the abstract of the case, no opinion being given, that it must have been decided upon the ground that the debtor, having fraudulently disposed of his property, was precluded from the benefit of the act. He was arrested upon the charge of having property or rights in action which he fraudulently concealed, and of having assigned and disposed of his property with intent to defraud his creditors, and the judge having become satisfied that the charge was substantiated, the debtor, to avoid a commitment, delivered an inventory of his estate, and an account of his creditors, and asked for an order directing an assignment, and for a discharge under the third subdivision, section ten. The judge was unable to determine what was the proper course to be pursued under the circumstance, and he made a provisional order for an assignment, which was executed, upon which the prosecuting creditor applied for a commitment, which the judge, though satisfied that the proceedings on the part of the debtor had not been just and fair, declined to grant. The order made by the judge is not set forth in the report of the case, and it does not appear in what respect it was provisional, in what contingency it was or was not to have effect. No authority exists for making any temporary order, for the debtor was entitled to have his property assigned, or he was not. It is possible, however, that the judge directed the assignment to be made, with the view of determining thereafter whether a debtor convicted of a fraudulent disposition of his property was entitled to a discharge under the act, or perhaps with an understanding between the parties, that the question should be sub-

mitted to the Supreme Court, and, if that court was of opinion that the debtor came within the provision of the act, that he would thereafter proceed to appoint assignees and grant the discharge, in pursuance of section seventeen. All that appears by the report is that the matter was brought before the Supreme Court, and that the prosecuting creditor applied for a mandamus to compel the judge to commit the defendant, and that his application was granted,—sufficient to show that in the judgment of that court it was the judge's duty to have refused the debtor's application for an assignment and a discharge, and to have committed him. I can regard the case in no other light than as an express determination of the point now before me. If the constructions contended for by the petitioner were put upon the act, it would be in the power of a fraudulent debtor to defeat the very purpose the Legislature had in view in enacting it, for as a coercive statute it would afford no remedy to the creditor where the debtor has disposed of his property fraudulently. The fraudulent disposition of property is made one of the cases in which a debtor may be proceeded against, and it is to be presumed that the statute was designed to have some effect in such a case. But if this construction is to be given to it, the strange absurdity would be presented of its being effective and operative in the other cases; but in this particular case, of its furnishing no remedy at all. The object of the Legislature in passing this act was to abolish imprisonment for debt in all cases founded upon contract, but at the same time to except from its operation a certain class of fraudulent debtors. It was designed as a remedial and humane statute, relieving from incarceration in prison the honest but unfortunate debtor who had no longer the means of satisfying his creditor. By the common law the creditor, after having first stripped the debtor of his property by a *feri facias*, might, if the claim remained unsatisfied, throw him into prison, and keep him there for life, unless he found means to discharge the obligation. His body was held as a satisfaction of the debt, and though by the Lords' act, passed in the thirty-second year of the reign of George II., upon which our insolvent laws were founded, he might be relieved from imprisonment upon surrendering all his effects to the cred-

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itor, unless the latter consented to pay two and sixpence a day for his maintenance, he was still subject, both in this State and in England, to be taken in execution and to remain in prison until he could give notice, present his petition, and obtain his discharge, under these remedial statutes. This system, which made no distinction between the honest and fraudulent debtor; that subjected to the rigors of imprisonment any man who was unable to pay a debt, though that inability may have resulted from causes which it was not in his power to control, which no sagacity could foresee, and no prudence avert, was a reproach to the law, and a violation of the plainest dictates of humanity and justice. It was the fruit of an age, the barbarous policy and spirit of which will be understood by a passage from an old case (*Many v. Scott*, 1 Mod. 132), where Justice Hyde says: "If a person be taken in execution and lie in prison for debt, he is not to be provided with meat, drink, or clothes, but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law, and so say I." While it was thus the intention of the Legislature to sweep away a feature so disagreeable to the intelligence of the age, it was equally their intention to subject the fraudulent debtor to the rigor of imprisonment; and by the passage of the act, to furnish to the defrauded creditor additional and more summary means to coerce the payment of his claim (*Townsend v. Morrell*, 10 Wend. 582; *Spear v. Wardell*, 1 N. Y. 144). The statute was intended to be what its name imports, "An act to punish fraudulent debtors." And in addition to the remedy given to the creditor with the view of preventing such frauds, the fraudulent removal, concealment, or disposition of property, or the receiving of it with intent to prevent its being made liable for the payment of the debts of the debtor, is declared to be a misdemeanor, and punishable criminally as such (*Son v. People*, 12 Wend. 344; *Thomas v. People*, 19 Id. 480). Now if a debtor fraudulently dispose of the whole of his property, with a view of preventing his creditor getting it, what benefit does the creditor derive by having him arrested and procuring his conviction, if the debtor can avoid a commitment, or be discharged from one, by making an assignment. He has no longer

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any thing to assign. He is required by the statute to set forth, under oath, his estate as it existed at the time of his arrest, and as it exists at the time he applies for the assignment. This he can readily do, having parted with all his property before he was arrested. Of what utility is it that the statute should provide for his being arrested at all in such case. The prosecuting creditor, it is true, gets an assignment of all his estate both in law and equity, in possession, reversion, or remainder (2 R. S. 79, § 25, 2 Ed.) But of what benefit is that, if there has previously been a fraudulent disposition of all the property. If he has a judgment, he can levy at once upon the property, if he can find it in the hands of the fraudulent assignee or vendee; or if it consists of choses in action, not subject to levy upon execution, he may invoke at once the equitable aid of the Court to set aside the fraudulent sale or assignment; or if he has merely commenced a suit, there being no defense to the debt in such a case, he may obtain judgment, and put himself in a position to attack the fraudulent transfer about as soon, in the great majority of cases, as he can secure the conviction of the debtor, and compel him to an assignment. His becoming then the assignee of the debtor's estate to the extent of his claim, places him practically in no better position to reach the property which has been fraudulently disposed of than he had as a judgment creditor. At best it could but enable him to proceed somewhat earlier; but I am unwilling to suppose that the sole object of the statute was to confer upon him this little advantage. It is also true that the debtor thus guilty of a fraudulent disposition of his effects, may be indicted for a misdemeanor, and punished criminally. But this is a matter with which the creditor has nothing to do. It is not intended for, nor does it afford, him any remedy for the recovery of his debt. It is an offense against the public, the same as any other crime, and is punishable as such. In the case of *Kershaw*, decided after the passage of the amendatory act of 1845 (2 R. S. 114, 3 Ed. §§ 36, 37), which allowed the defendant, after conviction, to put in special bail, Judge Ulshoeffer decided that that act removed all doubt as to the construction of the statute, and clearly contemplated that the disposition of property which precluded a

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discharge was a disposition after conviction, and before the debtor presented his petition. But that act made no change in the statute in this respect, but provided that a debtor adjudged guilty of either of the frauds specified in the fourth section of the original act should be entitled, in addition to the case provided for by the seventeenth section, to the discharge under that section, upon his putting in special bail to the action, whether a judgment or decree should have been rendered in the action or not. The only effect of this provision was to entitle the debtor to be discharged from the proceedings instituted by the creditor, upon his putting in special bail, instead of his making an assignment, or giving a bond that he would apply for an assignment within thirty days. But at the same time it provided, by section two, that though he may have put in and forfeited special bail, he should still be liable to be imprisoned upon any execution to be issued against his body in such suit, in the same manner as though the amendatory act had not been passed. It is difficult to determine what was meant by the latter provision, as the debtor could not have been imprisoned upon an execution, or upon a judgment founded upon a contract, the statute of 1831 declaring that no person should be arrested or imprisoned in such a case, unless he had committed some one of the frauds specified in the fourth section. His putting in special bail in such a case would seem to give the creditor no remedy, if the debtor's body could not be taken in execution. It may have been intended that if he could have put in special bail, his body should not be liable to be charged in execution, though the judgment or decree may have been founded on a contract, and that he should be left to obtain his release from imprisonment by petitioning for a discharge, the same as any other debtor imprisoned in civil cases. But whatever may have been the meaning or intention of the act, the amendatory act of 1846, Laws of 1846, 255, limited its operation to cases where the debtor was convicted of fraudulently contracting the debt, or incurring the obligation in respect to which the suit had been brought, the amendatory act of 1846 declaring that the act of 1845 should not apply to the case of a person arrested or imprisoned for

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either of the frauds specified in the first three subdivisions of the original act. It has, therefore, no application to the case of a conviction for fraudulent concealment, assignment, or disposition of property, in respect to which the original act remains unaltered. It may be asked if the debtor cannot obtain a discharge, how is he to get out of prison? The same question was put to the Court in the case before referred to of the *People v. Aikin*, 4 Hill, 606. That the debtor was convicted of having fraudulently concealed, removed, or disposed of a portion of his property. His discharge was denied for that reason, and the decision was held to estop him from making another application for a discharge. The Court was asked how he was to get out of prison, and they said that that was a question they were not to decide. The same answer may be returned here, and it was doubtless the fact that no authority existed for releasing a fraudulent debtor committed in a case like this, that led the Legislature, in the revision of the Code in 1851, to enact (§§ 802, 257), that in all cases of commitment under the act to abolish imprisonment for debt, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, in the court in which the judgment was rendered, upon such terms as may be just. In conclusion, I shall hold that Andriot, having fraudulently disposed of his property, within the meaning and intent of the sixteenth section, is precluded from the benefit of the act, and his application will, therefore, be denied.

Paulsen v. Dallett.

WILLIAM PAULSEN and others v. JAMES DALLETT and others.

Where a broker, under an employment to effect a sale of goods "to arrive," effects such a contingent sale, he is entitled to compensation for such service, notwithstanding the goods may never have arrived, and the sale never have been consummated.

A broker who performs services for another under a contract of employment, is entitled to recover compensation therefor, without proving any custom entitling him to a brokerage for like services.

APPEAL by the defendants from a judgment of the First District Court. The action was brought by plaintiffs who were brokers, to recover brokerage for affecting a sale of twenty thousand pounds of copper to arrive, at the request, and on the employment of the defendants. By the terms of the brokers' note of sale, the copper was to arrive during the month in which the sale was made. The copper not arriving during that month, the sale was canceled by the defendants and the purchasers.

The justice rendered judgment for the plaintiffs, and the defendants appealed.

Benedict, Burr & Benedict, for appellants.

James L. Phelps, for respondents.

By THE COURT.—CARDOZO, J.—The statement in the case shows that the request of the defendants, and the undertaking of the plaintiffs, was that the latter should "effect a sale of copper to arrive." The parties, therefore, clearly did not contemplate an absolute sale, because it was to be of goods to arrive, which necessarily made the agreement a contingent one, dependent upon the arrival of the property. The plaintiffs fully performed all that they undertook; they "effected a sale of the copper to arrive;" and the question is, shall they, having done their whole

duty, be deprived of compensation because, without fault on their part, the event upon which the contingent agreement would become an absolute sale, did not take place. When the employment of a broker, as in this case, only calls for his effecting a contingent sale, and he makes such an one, there is no reason why he should not be paid. If his principals meant that he should share with them the chances of the property not arriving, they should have made that a part of their agreement.

But it is insisted that they cannot recover because there is no proof of custom to pay brokerage on such contracts as this. The English cases which are relied upon by the appellants were reviewed by Judge Daly in *Van Lien v. Byrnes* (1 Hilton, 134), and it was there shown that they were decided upon a custom proven in them, prevailing in the city of London, "by which nothing was to be allowed the broker unless the matter brought about by his instrumentality is completed," and it was therefore held, as Judge Daly said, "that the broker must recover according to the usage or not at all."

But that class of cases has no application where all that the broker by his contract or employment undertook to do, was performed by him. Besides, in the absence of any proof of custom not to pay in such instances as the present, as was held in *Van Lien v. Byrnes*, the plaintiffs were certainly entitled to recover for their labor, and the ordinary amount of brokerage was at least some evidence of the value of their services, and there being nothing to show that that sum was unreasonable; the justice's judgment upon the statement of facts submitted to him was correct, and should be affirmed, with costs.

McDonald v. O'Flynn.

CATHARINE McDONALD, *Administrator, &c.*, v. JOHN F. O'FLYNN.

Where a transcript of a judgment, recovered in a District Court of the city of New York, for over \$25.00, exclusive of costs, is docketed in the county clerk's office, the judgment creditor or his attorney, and not the county clerk, is the proper person to issue an execution upon the judgment (disapproving *Brush v. Les*, 18 Abb. Pr. Rep. 398).

· APPEAL by the defendant from an order denying a motion to set aside an execution, issued herein, for irregularity.

On the 2d day of December, 1865, the plaintiff recovered, and duly docketed in the office of the county clerk, a judgment against the defendant, in the First District Court, for \$61.85, and on the same day an execution was issued for the amount of said judgment to the sheriff of the county of New York, signed by the attorney for the plaintiff.

It was claimed by the appellant that the execution should have been issued by the clerk of the county of New York, or the clerk of the Court of Common Pleas for the city and county of New York.

S. B. Cushing, for appellant.

Joseph P. Fallon, for respondent.

BY THE COURT.—BRADY, J.—The Code, § 64, provides that if a judgment in a justice's court be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, &c. Section sixty-eight declares that the provisions of sections fifty-five to sixty-four, both inclusive, relating to forms of action, to pleadings, *et cetera*, shall apply to the courts embraced in the title, of which section sixty-eight is a part, with the exception that in the city and county of New York, a judgment of \$25 or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in

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the same manner as, and be deemed, a judgment of the Court of Common Pleas for the city and county of New York. A judgment of the Court of Common Pleas cannot be enforced by an execution issued by the county clerk, and signed by him. The Code, § 289, provides that the execution must be signed by the party issuing it or his attorney. There is little analogy between section sixty-three and section sixty-eight in reference to the subject under consideration. The former declares that from the time a transcript of a judgment rendered by a justice of the peace shall be received and entered on the docket, it shall be a judgment of the county court. That section is silent as to the manner in which it shall be enforced. The following section, however, provides as already stated, that the transcript having been filed, the clerk of the county shall issue the execution. Section sixty-three relates to all judgments rendered by a justice of the peace; but section sixty-eight, so far as it applies to the subject under consideration, only to those for \$25 or over, exclusive of costs, which become judgments of this court upon the filing of the transcript. The Code, therefore, determines that when a judgment rendered by a justice of the peace has become a judgment of the county court, by filing a transcript in the office of the clerk of the county, the clerk shall issue the execution; and that when a judgment of the same or similar tribunal to that of the justice designated, becomes a judgment of this court, it is not only to be deemed a judgment of this court, but has the same effect as a lien, and may be enforced in the same manner, as a judgment originally rendered in this court. These provisions, considered carefully, lead to no other conclusion than that the execution issued upon a judgment such as contemplated, should be signed by the party or his attorney, in accordance with the requirements of section two hundred and eighty-nine already mentioned. There are, however, other statutory provisions relative to executions to be issued upon judgments obtained in the district courts of this city. The forty-eighth section of the act of 1857, in relation to these courts (1 vol. Laws 1857, p. 707), provides that the execution may issue as well out of the District Court in which the judgment was rendered, as *out of* the

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Court of Common Pleas. And section fifty-one of the same act also provides that execution for the enforcement of a judgment in a District Court may be issued by the clerk of that court at any time within five years from the entry of the judgment, and also *out of* the Court of Common Pleas after the judgment has been docketed in the county clerk's office. It cannot well be doubted that if the execution may issue out of the Court of Common Pleas, it must in form accord with the requirements of section two hundred and eighty-nine, and be signed by the party or his attorney. This statutory provision is in harmony with that of section sixty-eight, declaring that the judgment shall be enforced in the same manner as one of the Court of Common Pleas, and is, in effect, a legislative interpretation of the latter section. In relation to the case of *Brush v. Lee* (18 Abb. Pr. Rep. 398), it is only necessary to say that it is evident, from the report of that case, and the opinions given, that the judges participating in the decision rendered had not been advised of all the statutes to which reference has been made, and that no importance was attached to the case of *Ginocchio v. Figari* (2 Abb. Pr. Rep. 185), which substantially decided the question discussed in this case in favor of the regularity of the execution issued herein. However disposed we may be to adopt an adjudication upon the same question by another court, which reviews and interprets statutes and decisions, we do not consider this an appeal in which such a course would be justifiable. We do not think the case referred to correctly determines the law, and we cannot adopt, therefore, its conclusions.*

Order appealed from affirmed, with \$10 costs.

* Since judgment was rendered in the case in the text, the Court of Appeals (1 Trans. Appeals, 66), on appeal from the judgment in *Brush v. Lee* (18 Abb. Pr. R. 398), while affirming the judgment below, distinctly repudiated the doctrine that the execution should have been issued by the clerk, and not by the party or his attorney, thus confirming Judge Brady's construction of the statute.

Ruhl v. Phillips.

WILLIAM RUHL v. JOHN B. PHILLIPS, BENJAMIN S. MANY,
and THOMPSON LEWIS.

The finding of a referee upon a question of fraudulent intent is not conclusive or final, but may be reviewed on appeal.

A sale of the entire effects of an insolvent copartnership, upon a credit of from twelve to twenty-four months, the necessary effect of which was to postpone the payment of the creditors until the expiration of the term of credit, as well as to make the ultimate discharge of the copartnership debts dependent upon the pecuniary ability of the purchaser to pay the notes given by him as they respectively fell due,—*held*, as having been made with the intent to hinder and delay creditors, and was therefore void.

The hypothecation of a part of the property of an insolvent firm to secure the payment of an individual debt of a partner,—*held*, under the circumstances, sufficient to establish a fraudulent intent.

It makes no difference whether the sale of the whole of the effects of an insolvent copartnership upon credit, or the application of partnership effects to the payment of the individual debt of a partner, is accomplished by the creation of a trust, or by a direct sale to a purchaser. The effect in both cases is the same, to hinder and delay creditors, and what would be fraudulent in one form is equally so in the other.

THIS was an appeal from a judgment entered on the report of a referee.

The action was brought by the plaintiff as a judgment creditor of the defendants Many and Lewis, to have a sale made by them to the defendant Phillips set aside, as having been made with intent to hinder, delay, and defraud creditors. The case was referred to Lewis B. Woodruff, Esq., as sole referee, to hear and determine. He found, as a conclusion of law, "that the said sale and transfer to the said defendant, Phillips, was not void as against the plaintiff, and that the defendants are entitled to judgment in their favor declaring the sale, assignment, and transfer by the said Many on his own behalf, and on behalf of the said Lewis, to the said defendant Phillips, valid and effectual as against the plaintiff."

The plaintiff appealed to the general term. The facts sufficiently appear in the opinion of the court.

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John J. Townsend, for appellant.

Marsh, Coe & Wallis, for respondents.

BY THE COURT.—DALY, F. J.—I think the referee erred in holding, upon the facts found by him, that there was not, in this sale, the fraudulent ingredient of an intent to hinder and delay creditors.

It is insisted that the finding of the referee upon such a question as that of fraudulent intent is like that of a jury, and ought not to be disturbed. But the verdict of a jury upon such a question is not necessarily conclusive or final (*Spies v. Boyd*, 1 E. D. Smith, 450; *Randell v. Parker*, 3 Sand. S. C. R. 69). "Although this" (the question of fraudulent intent under the statute), said Senator Edwards in *Smith v. Acker* (23 Wend. 658), "is a question of fact to be submitted to a jury, I do not consider that their verdict is final and conclusive under all circumstances; should it be contrary to law or evidence, I suppose the court has the same control over their verdict in this as in other cases," and in *Hanford v. Artcher* (4 Hill, 271), although President Bradish was of the opinion that the jury alone were to pass upon the question of the weight or sufficiency of the evidence offered to rebut the presumption of fraudulent intent, he conceived that the statute had left the court in the unimpaired possession of its prerogative to pass upon the competency of the testimony to establish the fact. In this case the referee has found certain facts, the correctness of which is not disputed by either party, and the question presented is whether these facts are competent in law to establish, or to warrant, the finding that there was an absence of any fraudulent intent.

In my judgment, they were not, but established directly the contrary, for two reasons: 1. The sale was of the entire effects of an insolvent copartnership upon a credit of from twelve to twenty-four months, the necessary effect of which was to postpone the payment of the creditors until the expiration of the term of credit, as well as to make the ultimate discharge of the copartnership debts dependent upon the pecuniary ability of the purchaser to pay the notes given by him as they respective-

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ly fell due, and was thus an act to hinder and delay creditors; and, 2. Because there was an understanding between the parties, contemporaneously with the sale, that the purchaser was to pay individual debts of one of the copartners, to secure him in doing which, \$5,000 of the notes received, upon the sale of the copartnership effects was handed back to him to be appropriated by him, in part, in this way.

The firm of Many & Lewis, who had for many years been carrying on the jewelry business in Broadway, became insolvent. One of the partners—Lewis—was in favor of asking an extension; but the other partner—Many—was apprehensive that the creditors might sue, and that their property would be sacrificed by forced sales under judgments. One creditor threatened to sue; and Many, being satisfied that they could not continue in business by reason of their insolvency, applied to a person to accept an assignment of the property, in trust for the benefit of creditors, but he declined. And finding that the statute required that the assignee should give security for the faithful performance of his duties, they made no further effort to obtain one.

The defendant Phillips was the brother-in-law of Many. The firm were indebted to him in the sum of \$3,000, and, in addition, he was liable as indorser upon their notes to the extent of \$1,500. He was a stevedore, doing business in South street; was interested in the shipping business; had also purchased the interest of a person in a jewelry store in the Bowery about a year before, of which he had the supervision; and was worth, according to his own estimate, \$18,000, over and above his debts or liabilities.

Many obtained a power of attorney from his partner Lewis, authorizing him to make an assignment for the benefit of creditors, or to sell and dispose of the partnership effects; and with the design of selling the property for a sum sufficient to cover debts which he wished to secure, he made a computation of the amount of their debts, among which, it would seem, were debts due by him individually, and finding that they amounted to \$21,000, he concluded that he would sell the property to Phillips for that sum, and did so; Phillips

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giving his note for \$18,000, the \$3,000 due to him being allowed upon the purchase; the earliest of which notes were not payable until a year afterwards, and the last not until the expiration of two years. By this means he put it out of the power of the copartners to have any of the copartnership property, or the fruits of it, applied in the payment of copartnership debts until the expiration of a year.

He then gave Phillips \$5,000 of the notes to secure him against his indorsement, and for certain payments which Phillips was to make, which included an incumbrance in the form of a levy upon the goods in the store for taxes, the redemption of goods that had been pledged, which were included in the sale, money due to the employees, an outstanding bill for gas, and private debts of Many amounting to \$214, and a note of the firm which Many had given for his individual debt. The remaining \$13,000 of the notes were disposed of by Many as follows: One for \$3,000 was given by him to the landlord of the store, in payment of rent that was in arrear; and the remaining notes, amounting to \$10,000, were given to a firm, of which Many's brother was a partner, in payment of money lent.

When the sale was made to Phillips, he knew that the firm was insolvent. The property sold, at the inventory or cost price, was worth \$35,000. And there were book accounts due to the amount of \$3,600, making in all \$38,600. To a person taking the property, as Phillips did, to dispose of it, and collect the account in the ordinary course of business, it was worth \$25,000, or \$4,000 more than he gave for it; though it could not have been sold at that time for so large a sum, and under the pressure of a forced sale to satisfy creditors, the referee says, it would not have produced a greater sum than Phillips engaged to pay for it. So that it would seem that he got it upon a credit of from twelve to twenty-four months for what it would have brought upon a forced sale, upon judgments to satisfy creditors.

These facts are not disputed, and they show, in my judgment, that the transaction was fraudulent in law. It is well settled in this State that an assignment for the benefit of

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creditors which authorizes the assignees to sell the assigned property upon credit is fraudulent and void, as it operates to the hinderance of creditors who have the right to have the property of their debtor appropriated without delay to the payment of his debts (*Nicholson v. Leavitt*, 6 N. Y. 510; *Barney v. Griffen*, 2 Id. 365; *Kellogg v. Slauson*, 11 Id. 302; *Wilson v. Robertson*, 21 Id. 589; *Meacham v. Sternes*, 9 Paige, 405). And it is equally well settled that a provision in such an assignment that partnership effects of an insolvent firm may be applied in the payment of an individual debt of a partner, is also a violation of the statute, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors, as the operation of it is not only to hinder or delay the partnership creditors, but to deprive them of their debts (*Wilson v. Robertson*, 21 N. Y. 591; *Nicholson v. Leavitt*, 6 Id. 510; *Kirby v. Schoonmaker*, 3 Barb. Ch. R. 48; *Buchan v. Sumner*, 2 Id. 167).

It can make no difference whether the sale of the whole of the effects of an insolvent copartnership upon credit, or the application of partnership effects to the payment of the individual debt of a partner, is accomplished by the creation of a trust, or by a direct sale to a purchaser, as in this instance. The effect in both cases is the same, to hinder and delay creditors, and what would be fraudulent in one form, is equally so in the other.

Justice Paige was of opinion, in *Browning v. Hart* (6 Barb. 93), that the single fact of the sale by a debtor who is irretrievably insolvent, and against whom suits are pending, of all his goods upon a credit of one or two years, is conclusive as to the intent to hinder, delay, and defraud creditors, which is substantially the present case. To uphold such a transaction is to allow an insolvent debtor to do, by disposing of his property in this way, what he could not do by an assignment of it in trust for the benefit of creditors, and to get rid of the salutary provisions in the act of 1860, which require in such assignment a statement under oath of all the debtor's property, a full account of all his creditors, and of the consideration of each indebtedness, a bond, with sureties approved by a judge,

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from the assignee that he will faithfully discharge the trust and duly account, and under which act he can be compelled to account at the expiration of a year upon the petition of any creditor.

Judgment reversed.

ADOLPH PEARL v. ROBITSCHKE & TAUSSIG.

To entitle a defendant to a notice of assessment of damages on failure to answer, under subdivision 2 of section 246 of the Code, he must have appeared in the action "before the expiration of the time for answering." Not having appeared until after that time, it is not irregular for the plaintiff to proceed with the assessment without notice to him (overruling *Abbott v. Smith*, 8 How. Pr. 463; and distinguishing *Carpenter v. New York and New Haven R. R. Co.*, 11 Id. 481).

One of several defendants, not served with process, may anticipate such service by appearing in the action whenever his rights may be affected by the proceedings, and he is then as much entitled to service of papers on him, as if he had duly appeared after service of process (per BRADY, J.)

Where an order of reference to assess damages on failure to answer was, by mistake, obtained from another court than that in which the action was brought, and the witnesses were examined thereunder; but afterward, the mistake having been discovered, the case was referred by the proper court to the same referee, before whom all the witnesses, except one, reswore to their depositions; held, that the irregularity was cured as to the witnesses resworn after the referee had been duly appointed; and the fact that the referee had attached to his report some testimony which was irregularly taken, is not a ground for vacating his report, when the objectionable deposition may be entirely suppressed and disregarded without impairing the report itself.

APPEAL by one of two defendants from an order made at special term, denying a motion to open a default, and set aside plaintiff's proceedings, except on conditions. The action was brought for violation of trade mark. The defendant Robitschek was served with a copy of the summons and complaint on May 31, 1865; on the 15th day of July, 1865, the attorney for Robitschek served a notice of appearance on the plaintiff's attorney, which was returned as having been served after default. The plaintiff obtained an order inadvertently in the Supreme Court referring the action to D. P. Ingraham, Jr., Esq., to ascertain and assess the damages of the plaintiff as

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upon a default for want of an answer. After some of the witnesses had been examined, the mistake was discovered, and an order of reference was obtained from this court referring the cause to the same referee, to ascertain and assess the plaintiff's damages, and the witnesses previously examined were resworn by him. The defendant Taussig was not served with process, but appeared in the action, and was examined before the referee, and the plaintiff offered to discontinue the action as against him, and judgment was entered against the defendant Robitschek alone. The defendant, on the hearing of the motion, urged that the proceedings of the plaintiff were irregular: 1st. Because the decree entered is based upon the alleged report of a referee, part of which report consists of a forgery. 2d. The order of reference directing an assessment of damages was obtained without notice to defendant's attorney. 3d. The examination of witnesses before the referee was had without notice to said defendant's attorney. 4th. That most of the witnesses were examined before any order of reference had been granted, and some of them were resworn afterward.

The following opinion was given at special term :

BRADY, J.—My conclusions in this case are :

1. That the 246th section of the Code, in express terms, relieves the plaintiff from all obligation to give notice of an application for relief to a defendant who does not appear until after the time to answer expires, and that the proceedings of the plaintiff, therefore, in this action relating to the defendant Robitschek are regular.

2. That a defendant not served with process, but jointly charged with another, may anticipate the service of process by appearing in the action whenever his rights may be affected injuriously by the proceedings, and he will then be entitled to the service of such papers upon him as required when a defendant shall appear after service of process.

3. That the rights of the defendant Taussig to appear in this action was established by the evidence given before the referee, which related to his acts as well as those of the defendant Robitschek, and which shows that he had rights to protect which might be affected by the judgment.

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4. That the proceedings as to him, or relating to him, were therefore irregular, and must be set aside.

5. That no judgment having been entered against him, the motion on his part is granted without costs, and with liberty to the plaintiff to discontinue as to him on the payment of \$10 costs.

6. That the defendant Robitschek shall have liberty to appear and answer on the payment of \$10 costs and the sheriff's fees, the judgment to stand as security.

7. The terms of this order to be complied with in ten days, or the motion of the defendant Robitschek to be denied, with \$10 costs; and the election as to Taussig to be made during the same period, or the motion on his part to be granted with \$10 costs.

From this decision the defendant Robitschek appealed to the general term of this court.

Charles Wehle, for appellant.

F. C. Cantine, for respondent.

BY THE COURT.—CARDOZO, J.—It will only be necessary to examine the action of the special term as respects the motion of the defendant Robitschek. The decision below upon the motion of the defendant Taussig has not been appealed from, either by him or the plaintiff, and consequently is not before us for review.

By a notice served on the part of the defendant, he restricted the grounds of his application to the special term to four alleged irregularities, and consequently our examination may be confined to those points.

The first ground assumed below, that the decree is based upon a report which was in part a forgery, is not sustained by any evidence, and needs no further remark.

The second and third positions are embraced in one consideration. They are based upon the objection, that the plaintiff proceeded without notice to the attorney of the defendant Rob-

itschek, who served notice of appearance after the time for answering had expired. The plaintiff's attorney duly returned the notice of appearance, and proceeded as if he had never received it. I think it plain that Judge Brady was correct in holding that the plaintiff's practice was regular.

I do not see any reason in any case for a different rule under the Code, as to the effect of service of notice of appearance after the time for answering has expired, from that which prevailed under the former system when notice of retainer was served after a rule for default, but before assessment for damages. I had supposed, until my examination of this appeal, that there was no doubt that under the former practice a notice of retainer served after default could be disregarded, but I find that Judge Mitchell, in a special term case since the Code (*Abbott v. Smith*, 8 How. Pr. R. 463), says that this "is contrary to what is believed to have been the practice here." With great respect for the learned judge, I think this was incorrect. The question came directly before the late Supreme Court, in the case of *Lyods v. West*, 12 Wend. 235, and it was held by Judge Sutherland that the plaintiff had the right to disregard a notice of retainer served after default, and could not by a notice so served be required to delay his judgment by giving notice of assessment. And so the books of practice lay down the rule (1 Burrill's Pr. 373; Graham's Pr. 711; 1 Monell's Pr. 2d ed. 501).

The only decisions which I have been able to find upon the point under the Code are three special term cases, viz.: *White v. Featherstonhaugh*, 7 How. Pr. R. 357, in which Judge Harris held in conformity with the rule under the old practice, as I have stated it; *Abbott v. Smith*, above mentioned, in which Judge Mitchell took a contrary view of the effect of the Code; and *Carpenter v. The N. Y. & N. H. R. R. Co.* 11 How. Pr. R. 481, decided by Justice Hoffman in the Superior Court.

The precise question, however, which arises here was not presented either in the case in 7th Howard, nor in that in 8th Howard. Both of those cases arose under the first subdivision of the 246th section of the Code, which applies to cases in which the demand rested upon contract, and which declares

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that the defendant shall be entitled to notice of assessment of damages if he give notice of appearance in the action, while the present case comes under the second subdivision of the section, in which the right to exact notice of assessment is expressly limited to an appearance made "before the time for answering has expired."

Whether the rule which prevailed before the Code be or not the law now in cases under the first subdivision of this section, it is as clear as language can make it, that it is so as to cases coming under the second subdivision. Mr. Justice Hoffman seems not to have considered the difference in the phraseology of the two subdivisions of the section, and to have relied on the case in 8th Howard, which was inapplicable to the question before him, because the case in the Superior Court came under the second, while that in 8th Howard was under the first subdivision.

There is therefore no decision that can be regarded as authority, that the defendant was entitled to notice of the proceedings in this suit, and the language of the Code is too explicit to admit of a doubt that Judge Brady was right in the decision he made on this point.

The fourth and last alleged irregularity specified, is that the witnesses "were examined before any order of reference had been granted, and that some of them were resworn afterward." It appears that, by mistake, the plaintiff's attorney, supposing this case to be in the Supreme Court, obtained from that tribunal an order of reference to D. P. Ingraham, Jr., Esq., and proceeded to examine the witnesses, and their testimony was taken in the form of a deposition, and subscribed by them. Upon discovering his error, the plaintiff's attorney applied to this court, and procured an order of reference to the same gentleman. After this, all the witnesses except one appeared before the referee, but instead of being questioned anew, the depositions which they had made when the referee was acting under the order of reference granted by the Supreme Court were resworn to by them. This affords no ground of complaint. The witnesses were sworn by the referee after he received his appointment from this court. I have examined the evidence,

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and I do not find that there is any material fact testified to by Taussig, who was not resworn after the order of reference by this court, which is not proven by other witnesses, and I think the fact that the referee has attached to his report some testimony which was irregularly taken, is no reason to vacate his report when the objectionable deposition may be entirely suppressed and disregarded without in any way impairing the report itself.

I have thus considered every point upon which the defendant Robitschek based his application below, and being of opinion that they are all untenable, I think the order should be affirmed, with costs.

Order affirmed.

WILLIAM GRAHAM v. ROBERT H. BLEAKIE.

Where the title to land sold under a judgment of foreclosure is good, and the purchaser refuses to complete the purchase, a resale may be ordered, in which case the purchaser will be answerable for the deficiency; or the court may, if the purchaser is a responsible person, absolutely order him to complete the purchase, and, on his default, issue an attachment against him. The latter is the proper course where there is reason to believe that the purchaser is acting in collusion with the mortgagor to frustrate the sale.

Upon an order requiring a purchaser at a judicial sale to show cause why he should not complete the purchase, he may apply to the court for an order of reference to ascertain if a title can be made, and if it appears from the referee's report that the title is irremediably bad or of doubtful validity, the court will not compel him to complete the purchase.

The only estate of the mortgagor in the mortgaged premises was a leasehold interest, but the mortgage purported to convey the fee; and on a foreclosure of the mortgage, the judgment, following the terms of the mortgage, erroneously directed a sale of the premises as in fee. *Held*, that a purchaser at the sale under such decree, having full notice of the facts and of the leasehold title of the mortgagor, could not take advantage of the irregularity of the decree. Where the court has jurisdiction of the subject matter, and of the parties, a sale under its judgment will transfer to the purchaser whatever title the mortgagor has in the premises, even though the judgment should afterward be reversed or set aside for error or irregularity.

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Where a defect in the title of a mortgagor which is objected to by a purchaser on a foreclosure sale of the mortgaged premises, is offered, by the referee, to be effectually cured, by tendering to the purchaser a confirmatory deed by the mortgagor's grantor, such defect of title, if cured, cannot be urged by the purchaser as a reason for not completing the purchase.

Where a person who is ordered to show cause why he should not be punished for a contempt in not obeying an order theretofore served on him, insultingly refuses to receive the order to show cause, or a copy of the order disobeyed, and directs the person presenting the papers, to serve them upon his attorney, *Held*, sufficient proof of a demand and refusal, to authorize the issuing of an attachment.

APPEAL from an order directing a purchaser at a foreclosure sale to complete the purchase, and from an order directing that an attachment for contempt issue against him for refusal to obey, bailable in the sum of ten thousand dollars.

This action was brought for the foreclosure of a mortgage in which a judgment of sale was rendered for the plaintiff, from which the defendant Bleakie appealed, without, however, giving the undertaking, required by law, to stay proceedings. The mortgaged premises were sold at auction to George J. Carey, as the highest bidder, who thereupon signed the terms of sale, and paid ten per cent. of the purchase money, &c. Instead of completing the purchase by paying the balance of the purchase money to the referee when due, an extension of time was obtained from the referee, for that purpose, and on the 22d of September, 1865, the purchaser, by his attorney, filed with the referee, objections to the completion of the purchase, and demanded the return of the ten per cent. paid by him on account of the purchase price. These objections were substantially as follows:

1. There was no proper stamp affixed to the summons, as required by the Internal Revenue laws.

2. The alleged judgment entered in this action directs a sale of the premises in fee, and the said judgment has not been modified or vacated, but the referee has sold without reference to the authority given him by said judgment, an entirely different estate in the premises. The referee had no such power, and cannot convey any such estate.

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3. The said premises are, as matter of fact, incumbered with the right to the owners of the adjacent premises respectively, to use the side walls thereof as party walls; and the referee gave no notice to the purchaser of said lien.

4. The leases which form the foundation of the title of the mortgagor, appear to be, and were, executed by Valentine G. Hall, one of the executors of John Pounelle, whereas to confer any title, the same should have been executed by all the qualified trustees under the will of said John Pounelle, to whom the estate in fee of said premises belonged.

5. Under the foreclosure in this action none of the covenants of renewal for the payment of buildings, for the appointment of arbitration and otherwise, contained in said leases, are in any wise affected, but remain still outstanding and vested in the defendant, Jane Bleakie, and no title thereto can be acquired under the referee's deed herein.

6. The premises are subject to the payment, as between the purchaser at said referee's sale and the said Valentine G. Hall, of a ground rent of \$1,500 per annum, and to certain restrictions as to nuisances, the nonobservance of which by the owners of the adjacent premises would subject said purchaser to the risk of forfeiture and loss, and of which no notice was at the time of said sale given to the purchaser thereat.

7. The mortgage sought to be foreclosed in this action is a mortgage of the fee of the lots therein described, and not of the leasehold estate which was the sole estate of the mortgagor therein, and said mortgage does not authorize any foreclosure of said leasehold estate, nor the right of renewal or payment of the buildings thereon; nor can the purchaser be vested under said referee's deed with any estate or rights under said covenants.

To these objections the plaintiff's attorney served answers denying the allegations, or stating that the purchaser bought with notice of them, and that a deed of confirmation of said leases was in the hands of the referee for the benefit of the purchaser. The purchaser still refusing to complete the purchase, an order to show cause why he should not be required to do so, and in default thereof, why an attachment should not issue

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against him was obtained. On the hearing of the order to show cause, an order was made requiring Carey to complete its purchase within five days, and on his failure to comply therewith, it was ordered that an attachment issue against him.

It was alleged in the moving papers, and denied, that Carey was acting in collusion with the defendants to prevent the plaintiff from obtaining any benefit from the judgment herein.

From the above orders, the purchaser, Carey, appealed to the general term.

William R. Stafford, for appellant, on the point that the purchaser was not bound to take the title, cited *Heyer v. Deaves*, 2 Johns. Ch. 154; *Laight v. Pell*, 1 Edward's Ch. 577; *Yates v. Woodruff*, 4 Id. 700; *Fuller v. Van Giesen*, 4 Hill, 171; *Ryan v. Dox*, 25 Barb. 440, 7; *Darvin v. Hatfield*, 4 Sandf. 471. On the question of contempt, he cited *Pitt v. Davidson*, 37 Barb. 97; *Fassett v. Talmage*, 14 Abbott Pr. 188; *Gray v. Cook*, 24 How. Pr. 432; *Panton v. Zebbley*, 19 Id. 394; 2 *Rev. Stat.* 769, § 4; Code, § 285.

Albert Mathews, and *Lewis Johnson*, for the respondent, on the question of title, cited *Lawrence v. Delano*, 3 Sandf. 333, 2 *Rev. Stat.* 172, § 158; and on the question on practice, *Regua v. Rea*, 2 Paige, 239; *Crary v. Smith*, 2 N. Y. 60; *People v. Brower*, 4 Paige, 405; *Landsdown v. Elderton*, 14 Vesey, 512; *Livingston v. Fitzgerald*, 2 Barb. 396.

BY THE COURT.—DALY, F. J.—If the refusal of Carey to complete the purchase was upon the ground that the title was doubtful, he could, according to the established practice of courts of equity, have applied to the court for an order of reference to ascertain if a title could be made; and if, upon the coming in of the referee's report, it appears that there is a defect in the title which cannot be remedied, or that there is a well founded doubt as to its validity, the court will not compel him to complete the purchase (1 Sugden on Vendors and Purchasers, 60, n. 1; *Bannister v. Way*, Dick, 686; *Saunders v. Grey*, 4 Myl. & C., 515; *Tanner v. Radford*, Id. 518; *Harding v. Harding*, Id. 514; *Johnson v. Reardon*, 3 Ir. Eq. R. 200; *Hodder v. Ruffin*, 1 Ves. & B. 544; 2 Dan. Ch. P. 919).

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Upon the order requiring him to show cause why he should not complete the purchase, he made no such application, but relied upon certain written objections to the title which his attorney had served upon the referee, by whom the sale was made. There was but one of these objections that could create any doubt as to the validity of the title, and that was removed by the plaintiff's obtaining a deed of confirmation from the executrix, which was left with the referee, and of which Carey had notice.

The other objections were passed upon by Judge Cardozo upon the motion to show cause, and were properly adjudged by him to be without foundation. The third, fifth, sixth, and seventh objections relate to covenants or conditions arising upon the lease, of which Carey had full notice before the sale. By the terms of sale the estate was declared to be a leasehold interest in the premises, created by an instrument in writing, a certified copy of which was annexed, and which estate was to be sold subject to all the conditions, terms, and provisions in the instrument and in the lease, certified copies of which were also annexed. The terms of sale and the certified copies of the lease and the mortgage, were publicly read at the time of the sale, within Carey's hearing, and after the mortgaged premises were struck off to him, he signed a memorandum at the end of the written terms of sale, declaring that he had become the purchaser, and promising to comply with the terms and conditions of the sale. He had, therefore, ample notice of the matters which he afterward made a ground of objection, and subject to which he agreed to become the purchaser.

The first objection, that the summons in the foreclosure writ was without a Government stamp, was shown upon the motion to be unfounded in fact. As respects the second objection, it is sufficient to say that if the mortgage purported to convey a greater estate than Bleakie had in the premises, Carey was not misled by it, as he was advised by the terms of sale of the exact nature of the interest which the referee undertook to, and did, sell. If there was an irregularity in not entering up the decree for the sale of a leasehold interest, which was all that Bleakie could mortgage, that is not a matter of which a purchaser can

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take advantage (*Baker v. Sawter*, 10 Beav. 343; *Bennett v. Hamil*, 3 Sch. & Lef. 566; *Conyers v. Crosbie*, 7 Ir. Eq. R. 401). The court had jurisdiction of the subject matter and of the parties, and a sale under the judgment would transfer to the purchaser whatever title the mortgagor had in the premises, even though the judgment should be afterward reversed or set aside for error or irregularity upon appeal (*Breese v. Bange*, 2 E. D. Smith, 474; *Blakely v. Calder*, 15 N. Y. 617; *Packer v. The Rochester & Syracuse R. R. Co.*, 17 Id. 288; *Holden v. Sackett*, 12 Abb. 475; *Wood v. Jackson*, 8 Wend. 9; *Brainard v. Cooper*, 10 N. Y. 359; *Buckmaster v. Jackson*, 3 Scam. 104; *Bank of the U. S. v. Voorhes*, 1 McLean, U. S. 24). The decree followed the terms of the mortgage in the direction for the sale, and if the referee sold a lesser estate than was expressed in the mortgage it does not lie with the mortgagor to object, nor with the purchaser, when his title to the leasehold interest is confirmed by a deed from the executors.

Where the purchaser refuses to complete the purchase, a resale may be ordered, in which case he would be answerable for the deficiency; or the court, if the purchaser is a responsible person, may make an absolute order that he complete the purchase, or that an attachment issue against him (*Saunders v. Grey*, 4 Myl. & C. 515; *Landsdown v. Elderton*, 14 Ves. 512; 2 Rev. Stat. 278, 534; *Miller v. Colyer*, 36 Barb. 250; 1 Barbour's Chancery Practice, 536). The latter is the proper course where there is some reason to suppose, as I think there is in this case, that the purchaser is acting in collusion with the mortgagor, and that his object in refusing to complete the purchase is to frustrate the sale. This Carey denies; but his refusing, after a deed of confirmation was obtained, with the nature of the objections he has raised, indicate very plainly to my mind, that his real reason is not founded upon any apprehension respecting the title.

A certified copy of the order directing Carey to complete the purchase within five days was personally served upon him, and a copy of it was annexed to the order to show cause why he should not be attached as for a contempt. When the order to show cause, with the accompanying papers, was presented to

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him, he, as appears by the affidavit of service, insultingly refused to receive them, and told the person presenting them to serve them upon his attorney. This was sufficient proof, under the statute, of a personal demand and refusal, to authorize the issuing of an attachment (2 Rev. Stat. 535, § 4; *Lorton v. Seaman*, 9 Paige, 609; *Gray v. Cook*, 24 How. 432). Both orders should therefore be affirmed, but as the appeal from the judgment has been argued at the present term, and as the grounds relied upon for a new trial were deemed sufficiently grave to require a careful consideration on the part of the court, a stay of proceedings will be allowed upon application to any one of the judges, until the court shall decide whether it is necessary to grant a new trial or not.

ROBERT CRAIG v. THEODORE W. MARSH *and others.*

One who voluntarily parts with his goods, on a sale thereof, although thereto induced by the false and fraudulent representations of the buyer, cannot recover their value from a third person who has purchased them from the fraudulent buyer, for value, and without notice.

One V., falsely representing himself to the plaintiff to be the agent of the defendant, induced plaintiff to sell and deliver to him certain goods, which V. immediately sold, in the regular way, to the defendant, for value, without notice of the plaintiff's rights: *Held*, that by delivery of the goods the plaintiff conferred upon V. an apparent right of property, and he could not recover the price from the defendant.

APPEAL by the defendants from a judgment of the Marine Court at general term.

The plaintiff, owning seven barrels of cider brandy, sent them to one Melick, a commission merchant, to be sold. One Van Dyke called on Melick about the 10th of October, and inquired if he had any cider brandy for sale, and took samples; said he was buying for the defendants, and asked if Melick knew them. Melick replying that he did not, he was referred to one Story to ascertain their responsibility. A day or two

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afterward Van Dyke called again, and asked Melick if he had found that the defendants were good. Melick replied that he thought they were, from what Story said, and agreed to take ninety cents per gallon. Two days afterward Melick received an order by a carman, signed "T. W. & A. Marsh & Co. per Van Dyke," requiring him to deliver the brandy to the carman, with a bill. The brandy was delivered to the carman, and on calling three days afterward on the defendants, he found they had bought the brandy of Van Dyke, who represented himself to be its owner, at its actual value, and paid him for it. The defendants had had dealings to the amount of thousands of dollars for several years previous with Van Dyke, and found him straight-forward, but Van Dyke was not in their employ in any way.

The plaintiff brought this action after demand was made, to recover the value of the brandy.

The justice rendered judgment for the plaintiff, from which the defendants appealed.

Ten Broeck & Van Orden, for appellants.

J. Slawson, for respondent.

By THE COURT.—BRADY, J.—The facts in this case are as follows: Mr. Andrew D. Melick, who was in the commission business, as he states it, received seven barrels of cider brandy from the plaintiff for sale. A person named Van Dyke called upon Melick and said he was buying for the defendants, and after some negotiation a sale was made to the defendants, as Melick supposed, through Van Dyke. This having been done, the brandy was delivered to a carman upon an order for it purporting to be signed by the defendants "per Van Dyke." The defendants, however, neither authorized the purchase by Van Dyke, nor made it from the plaintiff. They purchased it from Van Dyke without notice of the manner in which it had been obtained by him or of the plaintiff's rights, and for value, which was paid. Melick did not know Van Dyke before the transaction stated; did not know whether he was the agent of

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the defendants or not, and made no inquiry on that subject before the goods were delivered upon the order signed "per Van Dyke," and sold to the defendants. The plaintiff must be regarded as having voluntarily parted with the brandy with the intent to sell the same, and the defendants as *bona fide* purchasers without notice. The possession of the brandy having been obtained with the consent of the plaintiff, he has no right of action against the defendants. By the delivery of the goods to Van Dyke he conferred an apparent right of property upon him, the delivery having been unconditional, and with the intent to part with the ownership (*Saltus v. Everett*, 20 Wend. 267; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, 3 Duer, 373; *Steelyard v. Singer*, 2 Hilton, 96; *Fassett v. Smith*, 23 N. Y. 252), and it matters not that the delivery was accomplished through fraud, although it is otherwise where the goods are tortiously or feloniously obtained (cases *supra*). It was not assumed upon the argument that Van Dyke had feloniously acquired the possession of the brandy. The plaintiff based his right to recover upon the ground that Van Dyke, having a mere naked possession, and having procured it by fraud, could confer no title. As we have seen, this view is not available against a *bona fide* purchaser. The plaintiff himself invested Van Dyke with an apparent right of property, upon which the defendant acted innocently. He did not, either personally or by agent, make any inquiries of the defendants or any other person as to the authority of Van Dyke to bind the defendants. Not only was his agent remiss in that respect, but he delivered the goods upon Van Dyke's order without knowing him. The equities are decidedly with the defendants. If the agent of the plaintiff had acted with common prudence, he would have ascertained that Van Dyke was attempting to perpetrate a fraud.

The judgment should be reversed.

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THOMAS ROBERT v. JAMES DONNELL *and others.*

Although the complaint in an action upon an undertaking for costs and damages upon appeal, does not contain an averment of the *delivery* of the undertaking, it will not be dismissed on that ground, the answer not averring nondelivery.

There being sufficient evidence on the trial to warrant the finding, that the undertaking was *filed* with the clerk of the court, the court will, on appeal from the judgment, amend the pleading, so as to conform it to the fact proved.

An objection, made at the trial, to the incompetency of a certified copy of a judgment as evidence of the judgment, is obviated, on appeal, by the production, on the argument, of a duly exemplified copy of such judgment.

APPEAL by the defendant from a judgment entered on the verdict of a jury at trial term.

The action was brought upon an undertaking to pay all costs and damages which might be awarded upon appeal from a judgment of the Marine Court to the general term of that court.

The complaint alleged, among other things, that on the 31st day of December, 1865, the defendants made and executed their certain undertaking in writing.

On the trial, after the jury was empaneled, the defendant's counsel moved to dismiss the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, in that it failed to allege a *delivery* of the undertaking. The court denied the motion. It was subsequently proved that the undertaking was filed with the clerk of the Marine Court.

The only evidence of the affirmance of the judgment appealed from, to secure which the undertaking in question was given, was a certified copy of the order of affirmance. The motion to dismiss was renewed, which was denied, and the judge sent the case to the jury, who rendered a verdict for the plaintiff. The defendants appealed.

Moses Ely and *John McCahill*, for appellant.

Henry Brewster, for respondent.

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CARDOZO, J.—I think the judgment below should be affirmed, for the following reasons, viz. :

1. I think the complaint sufficiently, although perhaps not with technical accuracy, shows a cause of action against the defendants, and they do not aver in their answer that the undertaking was not delivered by them.

2. The only denial in the answer, the falsity of which it rested upon the plaintiff to establish, is that which puts the affirmance of the judgment in issue. A certified copy of the order of the general term, affirming the judgment, was read in evidence, and, even if the general objection taken to its competency would present any question for our consideration, it is removed by the production, on the argument before us, of a duly exemplified copy of the order of affirmance, which it is proper for us to receive and consider (see *Jarvis v. Sewall*, 40 Barb. 449; *Dresser v. Brooks*, 3 Barb. 431, and cases there cited).

These views show that the other rulings complained of were not material, and therefore need not be considered.

DALY, F. J.—There was sufficient evidence in the case to warrant a finding, that the undertaking was filed in the Marine Court upon the appeal to the general term, and we can, upon this appeal, amend the pleading so as to conform it to the fact proved.

The judgment should be affirmed.

BRADY, J., concurred.

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CHRISTOPHER COXSON v. DANIEL DOLAND.

The amendment of 1864, of section 34 of the Metropolitan Police Act (Laws of 1864, ch. 403), which provides that no person holding office under that act shall be liable to military or jury duty, or to arrest on civil process, *nor* to service of subpoenas from civil courts while actually on duty, does not have the effect of exempting a police officer from arrest in a civil action whilst not actually on duty. The words of limitation, "whilst actually on duty," applies to the whole preceding sentence, and not merely to the last predicate.

The grammatical rule, which is also the legal rule in construing statutes, is, that when general words occur at the end of a sentence, they refer to, and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows.

Effect of substituting *or* for *nor* in a statute, considered.

The privilege from arrest, whether derived from the common law, or extended by statutory enactments, has proceeded upon the ground that the public interests would suffer if those intrusted with the discharge of public duties could be arrested on civil process while engaged in the performance of them, and this exemption has always been regarded as subsisting only while such person, in the view of the law, may be supposed to be engaged in the performance of his duties. Hence an intent on the part of the legislature to grant certain public officers absolute immunity from arrest on civil process, will not be inferred, but must be distinctly expressed.

APPEAL from an order denying a motion to vacate an order of arrest.

The defendant was a member of the Metropolitan Police force, and being arrested upon a civil process while not upon actual duty, moved to vacate the order of arrest on the ground that by the amendment of the Police Act, adopted in 1864, he was absolutely exempted from arrest. The motion was denied, and the defendant appealed.

BY THE COURT, DALY, F. J.—This is an appeal from an order denying a motion to discharge the defendant from arrest. He is a member of the Metropolitan Police force, and claims to be exempt from arrest under section 34 of the Metropolitan Police Act, as amended in 1864 (Laws of 1864, ch. 403).

This section, as originally enacted in 1860, read as follows: "No person holding office under this act shall be liable to military or jury duty, *nor* to arrest upon civil process, or to service of subpoenas from civil courts whilst actually on duty" (Laws of

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1860, vol. 2, p. 200). Under the section, as it then stood, it was held in *Hall v. Kennedy* (14 Abb. R. 432; *same upon appeal*, 15 Id. 290), that a person holding office under the act could be arrested upon civil process when not actually upon duty.

In 1864, the section was amended by substituting the word "or" for "nor," before the third, and the word "nor" for "or," before the fourth predicate, so as to read as follows: "No person holding office under this act, shall be liable to military or jury duty, *or* to arrest on civil process, *nor* to service of subpoenas from civil courts, whilst actually on duty" (Laws of 1864, ch. 403); and it is insisted that, by this change, a police officer is declared to be absolutely exempt from arrest upon civil process; that the words of limitation, "actually on duty," apply only to the last predicate, the service of subpoenas from civil courts. In other words, that he is only exempt from the service of subpoenas while actually upon duty, but is exempt altogether from arrest upon civil process.

Whatever may have been the object of this alteration, it is very plain that the substitution of the word "or" for "nor," and of "nor" for "or," has made no change in the meaning of the section, and the decision in the case of *Hall v. Kennedy*, is as applicable to it now as it was before. "Or" is a conjunction, marking distribution, an alternative, or opposition, and the conjunction "nor" performs the same office in negative propositions. The first is properly used in connection with *either*, and the latter with *neither*. The use of both in this case was inadmissible, and as the negative, "shall not," was placed at the beginning of the sentence, the transposition of "or" or "nor" from one predicate to another could in no way affect the meaning. It may be said that the Legislature must have meant something by the amendment, to which it may be answered, that if they did, they have not expressed it, and it is not for us to conjecture. Courts must interpret statutes according to the ordinary and plain meaning of the language used. "They must not," says Dwarria, "in order to give effect to what they may *suppose* to be the intention of the legislature, put upon the provisions of a statute a construction not *supported by the words*, though the consequences should be to defeat the object of the act. * * * The fittest course, in all cases where the inten-

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tion of the legislature is brought into question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand. * * * They are not to presume the intentions of the legislature, but to collect them from the words of the act, and have nothing to do with the policy of the law. * * * The most enlightened and experienced judges have lamented the too frequent departure from the plain and obvious meaning of the words, * * * and hold it much the safer course to adhere to the words of the statute, *construed* in their ordinary import, than to enter into any inquiry as to the supposed intention of the parties who framed the act" (Dwarris on Statutes, p. 703).

The whole section is expressed in one sentence, with the words "whilst actually on duty" at the end of it; and the grammatical rule, which is also the legal rule in construing statutes, is that where general words occur at the end of a sentence, they refer to and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows (2 Inst. 50; *Rex v. The Inhabitants of Shipton*, 8 B. & C. 94; Dwarris on Statutes, 704). 600

If it had been the intention of the legislature to give to the section the sense which is now sought to be put upon it, Justice Clerke has pointed out how it could and should have been done, by placing the words, "and whilst actually on duty," before the words "to the service of subpoenas from civil courts," which would have indicated that in that case the exemption was a qualified one, while in the other cases it was absolute.

It may be added, in respect to the question of legislative intent, that the privilege from arrest, whether derived from the common law, or extended by statutory enactments, has proceeded upon the ground that the public interests would suffer, if those intrusted with the discharge of public duties could be arrested upon civil process while engaged in the performance of them; and with the exception of ambassadors, or other public ministers, and their servants, who are privileged by the law of nations, and some exceptional cases growing

out of the peculiar form of the English government, this exemption has always been regarded as subsisting only while such person, in the view of the law, may be supposed to be engaged in the performance of his duties. Thus, members of a legislative body, while it is in session, or while going to, or in returning from it; attorneys during the actual sitting of the court; parties and witnesses attending court, or going to, or returning from it; soldiers and seamen in the public service; and voters during the pending of an election, are entitled to this privilege. There is an equally good reason why the privilege should be extended to police officers while engaged in the performance of their duties; but to exempt them while not actually on duty, would be carrying the privilege very far. It would be practically exempting them from the liability to which all other persons are subject for their tortious acts; and to warrant it, the public necessity which demands it should be apparent.

Seamen and soldiers in the public service are exempt by the statutes of the United States during their term of service; and the service required of policemen are of a somewhat analogous character. They are an organized body, under control and discipline, subject at all times to the orders of their superiors, and discharging a most important public function. At the same time, as guardians of public order, they are brought more immediately into contact with the citizens, and, in discharging their duties, act more as individuals than do seamen or soldiers in the public service. They are left more to the exercise of their discretion, and have more opportunities for abusing it. It has ever been a leading object, under our form of government, to protect the private citizen from the unwarrantable exercise of power upon the part of those in civil authority; so that it becomes a matter of grave consideration whether it is desirable to grant public officers immunity from those remedies to which all other citizens are subjected for their wrongful acts. An intent on the part of the Legislature to do so will not be inferred, unless it is plainly and distinctly expressed; and it has not been expressed in the amendment of this section by substituting one disjunctive

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conjunction for another. The order made at special term should be affirmed.

CARDOZO, J., concurred.

BRADY, J. (dissenting): I think the legislature intended by the Metropolitan Police Act, passed in 1864, as to the correct construction of the thirty-fourth section of which a question is presented on this appeal, to exempt all persons holding office under that act from arrest on civil process absolutely, and to service of subpoenas from civil courts while actually on duty, the compliance with which would require such immediate attendance as would oblige the person served to leave his post or place of duty. The absolute predicates of the section named are military duty, jury duty, and arrest; the limited or conditional predicate, "service of subpoenas whilst actually on duty." The particle, "nor," marks the second or subsequent branch of the proposition (which is its office) contained in the section, and that subsequent proposition is the limited exemption as contradistinguished from the previous positive exemption already named. "Nor," is not only a negative particle, the office of which has been already stated; but it is correlative to "neither" and "not," and "neither" is sometimes included in it. The last predicate of the section may, therefore, be read, "neither to service of subpoenas from civil courts whilst actually on duty." These results follow, in my judgment, from the grammatical construction of the language employed. The same conclusions follow from other considerations. The legislature amended the section after a decision (*Hart v. Kennedy*, 14 Abbott, 433), in which it was held that a member of the police force was liable to arrest while not actually on duty; and the amendment consisted in removing the particle "nor" from its place after the word "duty," and putting it after the word "process." Its former position divided the predicates, and made the liability to arrest, and to service of subpoenas, the second or subsequent branch of the proposition, and placed the exemption to arrest upon the contingency of being actually on duty. If, however, the change has accomplished nothing in terms, it

has at least expressed an intention, and that intention was to relieve members of the police force from liability to arrest on civil process. In my opinion, therefore, considering the question as one of legislative intent, founded upon legislative action in connection with a judicial interpretation, the order made at special term was erroneous.

I am aware that, in the case of *Burton v. Burton* (1 Keyes, 359), the Court of Appeals have made some changes in the rules by which statutes are to be interpreted; and that the history of legislation as to a particular statute has been eschewed as a means of ascertaining what was intended by the legislative will; but I do not think that this case falls within the prohibited line of reasoning.

I deem it also proper, as I differ from my brethren, to state some views upon the propriety of absolving members of the police force from arrest, when not actually on duty. It cannot well be denied that officers of the police force have relaxations from duty, the duration of which must depend upon circumstances, and that such repose from actual duty may often be preliminary to important public service, which could not be accomplished, if the officer by whom the privilege is employed should be arrested and taken to the proper officer to be bailed or discharged, or both, or kept in confinement for want of bail. It happens frequently that the public service requires all the effective force of the department, and that relief from duty is merely temporary, either to enable the officer to get sustenance, or rest, indispensably necessary to make his aid valuable or serviceable. That an emergency might arise in which the absence of the officer, founded upon his arrest or detention on civil process, would be prejudicial to the public good, is a sufficient reason for legislation by which that event should be rendered impossible. It could not well result from the service of a subpoena, inasmuch as the officer, though called away, is not in duress, and may be brought back to duty by a summons thereto, leaving the court or officer before whom he was summoned, to take such notice of his failure to appear when called, as that court or officer might deem proper. I have no doubt that the probable injurious effect upon the efficiency of the police corps by an arrest on civil process, founded upon some actual

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occurrence of that kind, in which its bad consequences were demonstrated, led to the passage of the section under consideration, and its amendment. Public policy, in my judgment, renders the exemptions wise which the legislature have sought to establish, and have, in my opinion, declared by the section of the act which has been mentioned.

I think the order made at special term is erroneous, and should be reversed.

Order affirmed.

ROBERT L. SMITH v. GEORGE W. WHITE.

The district courts of the city of New York, have no jurisdiction of an action upon a bond conditioned other than for the payment of money, except surety bonds given under section 58, subd. 6 of the Code of Procedure.

So held in an action against a surety on a bond conditioned for the appearance of a judgment debtor attached for contempt.

APPEAL by the defendant from a judgment of the Fourth District Court.

This action was brought against the defendant as one of the sureties on an attachment bond given by one John B. Fuller, for his appearance. Fuller was a judgment debtor, and having failed to appear and make discovery concerning his property, as required by an order of Justice Leonard of the Supreme Court, an attachment was issued against him for the contempt committed. On his arrest by the sheriff, the defendant and another signed the bond required by law to procure his discharge, the condition of the bond being, "that if the said John B. Fuller shall appear on the return of the said attachment, and abide the order and judgment of the court thereupon, then the above obligation to be void, otherwise to be and remain in full force and virtue." It was insisted that this condition had been broken, and that the defendant was liable for the amount due upon the judgment with interest and costs.

At the trial when the bond had been put in evidence, the defendant objected to the jurisdiction of the court. The objec-

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tion was overruled and the plaintiff was allowed to proceed, and judgment was given for him. The defendant appealed to this court.

Robert E. Topping, for appellant.

Albert Comstock, for respondent.

BY THE COURT.—BRADY, J.—John B. Fuller, a judgment debtor, was required by the order of Justice Leonard, of the Supreme Court, to appear before him and make discovery on oath concerning his property. He failed to appear, and on proper application therefor, an attachment was issued against him for the contempt committed. On being arrested by the sheriff by virtue of the attachment, the defendant and another signed as sureties the bond required by law to accomplish the discharge of the party under arrest (3 Rev. Stat. 5th ed., p. 851, § 13). The condition of the bond is, that if the said John B. Fuller shall appear on the return of the said attachment, and abide the order and judgment of the court thereupon, then the obligation to be void, otherwise to remain in full force and virtue. The plaintiff insisted that the condition of the bond had been broken, and that the defendant, as one of the sureties, the bond being joint and several, was liable for the amount due upon the judgment against Fuller, and the interest thereon and certain costs, amounting in all to the sum of one hundred and fifty-six dollars, besides interest and costs. When the bond had been given in evidence, the counsel for the defendant objected to the jurisdiction of the court in the action on the bond and the objection was overruled. The question of jurisdiction was presented on the appeal, and is to be considered. The act of 1857 (Laws, vol. 1, p. 707) by the third section declares in what actions the District Courts shall have jurisdiction, namely, in actions similar to those provided by sections fifty-three and fifty-four of the Code of Procedure where the sum recovered shall not exceed \$250, notwithstanding the accounts of both parties may exceed \$400, and in an action upon the charter ordinance, or by-law of the corporation

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of the city of New York or a statute of this State, where the penalty shall not exceed \$250. Section fifty-three of the Code provides that justices of the peace shall have jurisdiction in the following actions, and no other :

1. An action arising on contract for the recovery of money only, if the sum claimed do not exceed \$100.

2. An action for damages for injury to rights pertaining to the person, or to personal or real property, if the damages claimed do not exceed \$200.

3. An action for a penalty not exceeding \$200.

4. An action commenced by attachment of property as now provided by statute, if the debt or damages claimed do not exceed \$200.

5. An action on a bond conditioned for the payment of money not exceeding \$200, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by installments, an action may be brought for each installment as it becomes due.

6. An action on a surety bond taken by them, though the penalty or amount claimed exceed \$200.

7. An action on a judgment rendered in a court of a justice of the peace, or of a justice's or other inferior court in a city where such action is not prohibited by section seventy-one.

8. To take and enter judgment by confession, where the amount shall not exceed \$500.

9. An action for damages for fraud in the sale, purchase, or exchange of personal property, if the damages claimed do not exceed \$200.

10. An action to recover the value of personal property, the value of which, as stated in the affidavit of the plaintiff, his attorney, or agent, shall not exceed \$100.

By the Laws of 1862, chapter 389, the legislature also declared that the Marine and District Courts should have jurisdiction of actions in which the people of this State are a party, where such actions are brought by the Commissioners of Public Charities and Correction in said city, upon bastardy or abandonment bonds, and the amount demanded or recovered did not exceed \$500; and by chapter 484 of the laws of the

same year, the legislature further provided that sections 206 to 217, inclusive, of the Code of Procedure should apply to the Marine and District Courts of this city, &c. These sections relate to the "claim and delivery of personal property." We have thus before us the laws declaratory of the jurisdiction of the District Courts, and it appears from them that none has been conferred in reference to bonds such as presented in this action. The fifth subdivision of section fifty-three relates to bonds for the payment of money only. The whole subdivision makes that conclusion inevitable, the last provision thereof providing that where the payments are to be made by installments, an action may be brought for each installment as it shall become due. The District Courts were not invested with jurisdiction upon bonds with conditions other than for the payment of money, excepting, however, surety bonds taken by them as provided by subdivision 6 of the fifty-third section of the Code. Jurisdiction, by that section, is given in a class of cases named, and no other, and the exception just mentioned shows that it was designed to limit the jurisdiction of these courts to actions on bonds for the payment of money only. Section fifty-four contains no provision from which jurisdiction in cases like this can be inferred. Its subdivisions limit or except from the general jurisdiction given by section fifty-three certain actions which would otherwise be included in its terms. Judge Hilton, in the case of *Mahoney v. Gunter*, 10 Abb. Pr. 431, expressed an opinion that the District Courts had no jurisdiction of actions on bonds other than for the payment of money, and upon an examination of the question, such is my conclusion. The question, however, was not decided in the case mentioned, and is not cited therefore as an authority. I think, for these reasons, the judgment should be reversed. We have not been advised of the respondents' views of this case, no points having been submitted by them, although ample opportunity has been given.

Judgment reversed.

McGuire v. The Hudson River Railroad Company.

DENNIS MCGUIRE v. THE HUDSON RIVER RAILROAD COMPANY.

It is negligence for a railroad company to permit its cars to stand upon and obstruct a public street; and where, by reason of such obstructions, the view of the track in one direction is cut off, and it was rendered impossible for the plaintiff, in crossing the track, to observe a train approaching in that direction, *Held*, that it was not negligence, as matter of law, for the plaintiff to omit to look in the direction, the view of which was thus obstructed.

APPEAL by the defendant from a judgment at trial term, and from an order denying a motion for a new trial. The action was brought to recover \$250 damages for injuries to plaintiff's horse, cart and harness, caused by a collision from the careless and negligent running of one of defendants' dummy engines over their road in Hudson street, near Harrison, on or about the 3d of September, 1864. It appeared that, on the day in question, Michael Hadden was driving plaintiff's horse and cart from the Hudson river through Harrison street to Hudson street, where he turned to the right, and came down along the curb to about the middle of the block, where, in attempting to cross Hudson street into Worth, the horse and cart were struck by defendants' dummy, moving north on the east track of their road. Hadden was standing on the cart behind a bale of hay. There was a freight car standing on the west track, and the collision was near one end of it. The driver looked straight ahead and down the street to see if a car was coming, but saw none. At the instant of collision he had an eye on his horse, looking across the street, but did not remember looking down, but saw nothing coming up. He saw no flagman ahead—heard no whistle—no bell. The first he knew of the dummy coming, was when the horse was struck. One shaft of the cart was broken, the harness torn, the horse knocked down and ran over, the whole fetlock of one hind foot cut quite off, and the horse died in two days.

The defendants offered no evidence, but moved to dismiss the complaint. The motion was denied, and the jury rendered

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a verdict for the plaintiff. The defendants' counsel moved for a new trial on the judge's minutes, which motion was denied.

Thomas M. North, for the appellant, cited on the question of contributory negligence :

Stevens v. Osw. & Syr. R. R. Co. 18 N. Y. 422 ; *Dascomb v. Buff. & St. L. R. R. Co.* 27 Barb. 221 ; *Mackey v. N. Y. C. R. R. Co.* 27 Barb. 528. On the point that the burden was on the plaintiff to show his own care to avoid the collision, *Wilde v. Hudson River R. R. Co.* 24 N. Y. 430 ; 29 *Id.* 315 ; *Suydam v. Grand Street & North R. R. Co.* 17 Abbott's P. 309.

Theodore Stuyvesant and *L. B. Peet*, on the question of contributory negligence, cited *Brand v. Schenectady & Troy R. R. Co.* 8 Barb. 368, 379 ; *Beers v. Housatonic R. R. Co.* 19 Conn. 566, 576. On the question of defendants' negligence, they cited *Bradley v. Boston & Maine R. R. Co.* 2 Cush. 539 ; *Linfield v. Old Colony R. R. Co.* 10 Id. 562 ; *Macon & W. R. R. Co. v. Davis*, 18 Geo. 679 ; *Shelbyville Lateral Branch R. R. Co. v. Newark*, 4 Ind. 471.

BY THE COURT.—CARDOZO, J.—The driver of the horse owned by the plaintiff was proceeding through Harrison street, with a view to cross Hudson street, so as to get into Worth street.

The defendants had a freight car, the box of which was forty feet long, and as high as the dummy engine which caused the mischief, standing on the west side of the track.

The freight car was standing on a hill, while the dummy came up from a plain, and a man standing on a cart crossing from Harrison street could not see the dummy.

This, I think, is a fair statement of the evidence.

Whether the driver of the horse looked down Hudson street, or not, is somewhat doubtful on his own testimony, as he first swore that he did and afterward that he did not. Whether he did, or not, therefore, was not clear or certain, but was a question of fact to be decided by the jury.

Be that as it may, whether the driver looked "straight

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ahead," crossing from Harrison street, which would be directly across Hudson street, or whether he looked down the latter street, seems to me, under the circumstances of this case, quite immaterial. The defendants had placed in the street such an obstruction that the driver could not see if he had looked, and I think he can not be charged with negligence in not attempting to do that which the act of the defendants had rendered impossible.

The defendants had no right to obstruct the highway by keeping the freight car standing on the track. Doing so was an act of negligence on the part of the defendants.

I think the judge properly refused to dismiss the complaint, and that he correctly submitted the case to the jury.

Judgment affirmed.

KOEHLER v. BROWN.

By a resolution adopted at a meeting of a voluntary association, the object of which was to form a common fund, out of which to pay each member drafted into the army a fair and equitable share of said fund, or furnish a substitute, the treasurer of the society was directed, in case no draft took place, to pay or return to each member the amount contributed by him to the fund. No draft took place. *Held*, that an action for money had and received might be maintained by a member against the treasurer, to recover the amount of his contribution, it appearing that the latter had possession of the funds.

APPEAL by the defendant from a judgment of the Eighth District Court. The facts are fully stated in the opinion of the court.

Thomas Cushing, for appellant.

Frederick Smyth, for respondent.

BY THE COURT.—BRADY, J.—The plaintiff and the defendant were members of a society styled "The American Mutual

Exemption Society," the object of which was to form a common fund, out of which to pay each member drafted into the United States armies a fair and equitable share of said fund, or furnish a substitute. By the fourth article of their constitution it is provided, that, on entering the society, each member shall pay to the secretary the sum of thirty dollars, and a further sum of seventy-five dollars on, or before the day prior to, a draft. By the fifth article it is provided, that the secretary shall pay over immediately to the treasurer all moneys received, taking his receipt for the same. By article thirteen it is provided, that, in case no draft takes place, all moneys, less expenses, will be returned to each member. The defendant was the treasurer of the society. The plaintiff paid to the secretary one hundred and twenty dollars for four persons, who have assigned their claims to him, and that sum was paid to the treasurer, the defendant, and deposited to the credit of the society in the names of plaintiff and defendant. The society duly passed a resolution directing the payment or return of the money paid by each member under the thirteenth article recited, in case no draft took place. No draft did take place, and the defendant, under and by virtue of that resolution, having received the moneys or funds of the society, paid to various persons moneys received from them, deducting five dollars from each member to defray expenses. All the questions of fact were submitted to the jury under the charge of the justice without exception, and the only question we are called upon to consider is, whether the plaintiff, being a member of the society, could maintain this action against the defendant. The members of the society were partners. It was not formed under any general or special law of the legislature, and was nothing more, therefore, than an ordinary partnership (*Townsend v. Goewey*, 19 Wend. 424; *Wells v. Gates*, 18 Barbour, 554). The resolution to refund the money paid was virtually a dissolution of the co-partnership. The object of its creation had ceased when it appeared that no draft was to take place. The resolution was also a settlement with each member of the association who paid the thirty dollars entrance fee, and a balance struck in his favor of twenty-five dollars, five dollars having been determined upon as the amount

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each member was to pay as his proportion of the expenses attending the organization and continuance of the society. The defendant recognized this action and order of the society by payment in accordance with its terms, and promised to pay any further certificates presented to him. There is no reason why the defendant should not pay, it having been determined as a matter of fact that he had the funds in his hands to do it. When a balance is struck between copartners, and a promise to pay is given, there is no doubt that an action of assumpsit may be maintained by the partner receiving the promise. The rule is very old and well established. The defendant had the funds of the society, and promised to pay to the members holding certificates the balance due to them, determined upon by all the members in proper communion. The action for money had and received was properly brought against him. The design of the society was the appropriation of money received for the benefit of its members upon a certain contingency, and when that contingency did not occur, and the society so declared, the money in the defendant's hands was a fund which, *æquo et bono*, he ought to pay over to those entitled to its return, when directed so to do by the society.

I think the judgment should be affirmed.

WILLIAM WALKER, *Administrator of the goods, &c. of Emily Orcott* v. GEORGE B. GILBERT, *and another.*

On the trial of an action for rent reserved in a lease, it appeared that the tenant's goods had been injured by rain leaking through the roof, and that the landlord had agreed to apply the tenant's damages on account of the rent as it fell due, which were to be ascertained by selling the damaged goods at auction. The defendant's counsel requested the judge to charge the jury that "if they found that the plaintiff had agreed to ascertain such damages by having the damaged goods sold at auction, and by deducting the amount so obtained from their invoice price, and to apply the amount so ascertained in payment of the rent as it fell due, and that all this was done,—then they should find a verdict for the

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defendants." *Held*, that the judge properly refused so to charge, as the proposition did not involve the necessity of the jury's finding a mutual agreement, but only an undertaking on the part of one party, which would be without consideration and void.

Such an agreement, if mutual and concurrent in point of time, may be upheld; but as the defendant's counsel did not ask to have the jury determine whether such an agreement was made, nor take any exception to the direction to find for the plaintiff, nor ask for judgment on the evidence, on the ground of such an agreement, the verdict for the plaintiff will not be disturbed, on appeal.

APPEAL by the defendants from a judgment of the Marine Court.

The action was for rent of premises 114 Chambers street, leased by the plaintiff, as administrator, to the defendants for one year from the first day of May, 1862, at an annual rent of \$1,800, payable quarterly. The defendants, by way of defense, state, that on the 14th day of April, through a defect in the roof of the building, they were flooded and damaged \$1,240, and they set up that there was an agreement to allow this damage by way of payment of the rent for which the action was brought. They also set up in their pleadings an agreement, upon a "valuable consideration," to repair. There was evidence that the plaintiff agreed to pay the defendants' damages, and that, for the purpose of ascertaining the amount, the goods should be sold at auction, and the difference between the amount realized and the invoice price, should be applied in payment of the rent as it fell due. The defendants' counsel requested the judge to charge the jury, "that if they also found that the plaintiff had agreed to ascertain such damages, by having the damaged goods sold at auction, and deducting the amount so obtained from the invoice price of the same, and to apply the amount of the damage so ascertained in payment of the rent as it fell due; and that all this was done, and the amount of damage so ascertained exceeded the amount of rent due on August 1, 1863, for the recovery of which this action is brought, that then they should find a verdict for the defendants."

The court declined so to instruct the jury, to all of which the defendants excepted.

Under the peremptory direction of the presiding justice, the

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jury found a verdict for the plaintiff for the sum of \$477.94. The defendants appealed to this court.

George W. Parsons, for the appellants.

I. As owner of the entire building, plaintiff was liable for injuries to defendants resulting from the condition of the premises adjoining those leased to defendants, caused by the negligence of plaintiff, either in the faulty construction or in the failure to repair. In this case a fault in the construction of the building occasioned the damage (*Eakin v. Brown*, 1 E. D. Smith, 43; *Tenant v. Goldwin*, 6 Mod. 311; 1 Hilliard on Torts, 129).

II. Then, if it were admitted that it was doubtful whether the plaintiff was liable, as he supposed, it is an elementary principle of law that compromises of uncertain or conflicting rights constitute a valid consideration for an agreement. The law favors them, and will not inquire into the question compromised, or the relative force or value of rights, if there be only an honest actual compromise of what are supposed to be valid claims (1 Parsons on Contracts, 367; 1 Parsons on Notes and Bills, 196; *Lingridge v. Dorville*, 5 Barn. & Ald. 117; *Seaman v. Seaman*, 12 Wend. 381; *Russell v. Cook*, 3 Hill, 504, and cases cited; *Stewart v. Ahrenfeldt*, 4 Den. 189). A mere mistake of the law will not impeach a compromise (*Stewart v. Stewart*, 6 Clark & F., 911-968; *Taylor v. Patrick*, 1 Bibb R. 168; *O'Kesson v. Barclay*, 2 Penn. 531; *Thorpe v. White*, 13 Johns. 53).

III. The agreement to compromise, as has been seen, was fully completed; and nothing remained but to ascertain the amount of the damage in the matter agreed upon. This was done. (1.) If it be claimed that this was a verbal agreement to submit the question of amount to this mode of arbitration or adjustment, we answer it was good and binding (*Deidrich v. Richley*, 2 Hill, 271; *McManus v. McCulloch*, 6 Watts, 359). (2.) Even an agreement to abide by the result or decision is not necessary; the law will imply it (*Valentine v. Valentine*, 2 Barb. Ch. 430). And an oral or parol award is sufficient

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when the submission is verbal (*Wells v. Lain*, 15 Wend. 99; *French v. New*, 20 Barb. 481; and see *L'Amoreaux v. Gould*, 7 N. Y., 349, and cases cited).

E. B. Hinsdale, for respondent.

I. A landlord is in no case bound to repair, unless by force of an express covenant or contract (*Howard v. Doolittle*, 3 Duer, 464; *Sherwood v. Seaman*, 2 Bosw. 127; *Cleves v. Willoughby*, 7 Hill, 83). If a parol agreement to repair is proved to have been made subsequent to a written lease, it must be upon a "*new and sufficient consideration*" (*Post v. Vetter*, 2 E. D. Smith, 248; *Speckels v. Sax*, 1 E. D. Smith, 253). There is no pretense that there was an express agreement to repair.

II. If the respondent was legally liable for the damage caused by the overflow, the bargain was binding; if he was not liable, the agreement was void for want of a consideration (*Cabot v. Hoskins*, 3 Pick. 83; *Fowler v. Shearer*, 7 Mass. 14; *Ehle v. Judson*, 24 Wend. 97; *Sherman v. Barnard*, 19 Barb. 291; *Watkins v. Halstead*, 2 Sand. 311).

III. One who acknowledges himself liable through a mistake of the law, is not bound by his agreement or acknowledgment (*Silvernail v. Cole*, 12 Barb. 686; *Warder v. Tucker*, 7 Mass. 449).

BY THE COURT.—CARDOZO, J.—This case differs essentially from the one between these parties, decided by the Superior Court in March, 1864. In that case there was no proof of any mutual agreement between the parties that the damaged goods should be sent to auction; and it was for that reason—the absence of such evidence—that the Superior Court held the promise of the plaintiff, to allow the damages ascertained by the sale at auction to be deducted from the rent, to be without consideration and void. But in the case at bar, there is testimony showing a mutual agreement, concurrent in point of time, between the parties, that the goods should be sent to auction, and that the damages sustained by the defendants should thus be ascertained, and then deducted from the rent;

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and therefore the ground upon which the Superior Court held the plaintiff's undertaking to be void is removed, and there can be no doubt that his agreement was founded upon a sufficient consideration (Chitty on Cont., 29).

I should, therefore, be in favor of reversing this judgment, were it not that the point does not seem to have been presented to the court below. The case seems to have been tried and disposed of below, upon the assumption that the proof did not show a mutual agreement, but only an undertaking upon the part of the plaintiff, subsequently acted upon by the defendants, which, however, would not support the promise of the plaintiff (*The Utica, &c., Railroad Co. v. Brinckerhoff*, 21 Wend. 139), and the defendants did not direct the attention of the court below to the fact that any mutual agreement, concurrent in point of time, had been shown, nor ask to be permitted to go to the jury as to whether any such had been proven. The ground assumed by the defendants, was, that if the jury "found that the *plaintiff* had agreed to ascertain such damages by having the goods sold at auction, and deducting the amount so obtained from the invoice price of the same, and to apply the amount so ascertained in payment of the rent as it fell due, *and that all that was done*, then the verdict should be for the defendants."

But this could not be sustained; because the proposition did not involve the necessity of the jury finding a mutual agreement, but only an undertaking on the part of one party, which would be without consideration and void. The Marine Court was therefore right in refusing the request made by the counsel for the defendants, and as the counsel did not take any exception to the judge's peremptory direction to the jury to find for the plaintiff, and did not ask judgment in favor of the defendants on the evidence, on the ground that there was a valid mutual agreement, concurrent in point of time, proven; nor ask to have the question whether such an agreement had been made, submitted to the jury, it is too late to raise the point now, and therefore the judgment should be affirmed.

Judgment affirmed.

Lewis v. The Park Bank.

WILLIAM H. LEWIS v. THE PARK BANK.

It being, by statute, the duty of a public officer to deposit all public moneys received by him in some bank selected by him, &c.:

Held, That the mere designation of a bank by the officer as the depositary of the public funds, imposed no duty and conferred no right upon such bank as to such funds, until actually deposited with, and accepted by, it.

The Broadway Bank having been selected by the city chamberlain as the depositary of the public moneys, in the place of the Park Bank, which had been selected by a former chamberlain, demanded from the latter the public funds on deposit with it, which, on refusal, it was compelled, by *mandamus*, to deliver. In an action by the assignee of the Broadway Bank against the Park Bank, to recover damages for the wrongful detention of such moneys: *Held*, On demurrer to the complaint, that no action would lie.

APPEAL by the plaintiff allowing a demurrer to the complaint.

The complaint alleged and the demurrer admitted:

1. That the Broadway Bank, the assignor of the plaintiff, was, on the 26th December, 1860, by the city chamberlain, appointed depositary of moneys belonging to the city and county of New York, and notice thereof given to the defendant.

2. That the moneys on deposit with the Park Bank were demanded, but it refused to surrender, transfer, or deliver the same to the comptroller of the Broadway Bank.

3. That the Supreme Court, by peremptory *mandamus*, commanded the defendant to transfer and pay over the said funds to the Broadway Bank, and the same were, on the 15th February, 1861, transferred and paid over to said bank.

4. That, by the refusal to surrender and deliver said moneys before the last mentioned day, and the detention thereof, plaintiff suffered loss and damage, that is, the interest it would have made by loaning out the deposits during the time which elapsed from December 26, 1860, to February 15, 1861. The defend-

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ant demurred to the complaint, which the court allowed, and dismissed the complaint, with the following opinion :

CARDOZO, J.—I think it is an error to suppose that the Broadway Bank, the assignor of the plaintiff, had any legal right whatever, until money had actually been deposited with it by the chamberlain, and as that error lies at the basis of this action, the defendant is entitled to judgment on the demurrer.

An examination of the act of 1860 (ch. 477, p. 953), shows that the deposits are to be made by the "chamberlain," from time to time, as received by "him." The designated bank is to receive the deposits from the chamberlain, not from any one else. It is a mistake to term the bank a "depository" of the money until it has actually been deposited. The chamberlain, by virtue of his office, may have the right to demand the possession of money belonging to the city, to deposit in the bank he designates under his official bond, but that was *his* right, and not the bank's, and could not confer any interest or right of action on the latter. Until money has actually been received by the chamberlain and deposited by him, it being his duty, "without delay," upon its receipt, to make the deposit, it is only a question of the performance of his official duty. It may be, though I express no opinion on the point, that the city or the chamberlain might have maintained, and that perhaps it was his duty to bring, an action against the Park Bank to recover the deposits, with interest, for the benefit of the public, but, until the deposits actually reached the Broadway Bank, it had no interest in them. This seems to me to be clear from another consideration. The mere designation by the chamberlain of a bank, under his official bond, pursuant to the above-mentioned statute, did not devolve any duty upon the bank. It was not obliged to receive, and might refuse to accept, the deposits. The designation, therefore, imposed no duty, and consequently gave no right. Its duty and its right commenced when money was actually deposited with and accepted by it. Then it became a "depository."

The mandamus mentioned in the complaint was a proceeding, not upon the part or behalf of the Broadway Bank, but

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upon the relation of Mr. Devlin, the chamberlain, and in the absence of any averments showing that the Supreme Court decided any thing more in that matter, I think the whole effect of that proceeding was to establish the right of the chamberlain to change the bank of deposit, and to transfer the money, of which he is the legal custodian, to the newly selected bank. I do not see that any right of the Broadway Bank was passed upon in that matter. Judgment for defendant on demurrer, with costs.

From the judgment the plaintiff appealed to the general term.

Stilwell & Swain, and *John E. Burrell*, for appellant.

I. By the laws of 1860, it became the duty of the comptroller to select the particular bank in which the moneys of the city and county were to be deposited.

II. The bank in which the moneys of the city and county are by law required to be deposited, are not to be regarded merely as private depositaries, but become, to some extent, public officers, and charged with duties to the public and to each other, the due performance of which may be enforced.

III. The refusal of the defendant to pay over the moneys to the Broadway Bank was wrongful, and in violation of the duty imposed on it by law, and, for such refusal, an action lies in favor of any party injured.

IV. The Park Bank, not having any interest in or claim upon the moneys, the request of the chamberlain to deliver over these moneys to the Broadway Bank, operated, so far as the two banks were concerned, as a transfer of such moneys to the Broadway Bank, and entitled such bank to receive them; in other words, the authorization and request created and vested in the Broadway Bank an interest in such moneys sufficient to entitle it to maintain this action.

V. The peremptory mandamus mentioned in the complaint, and which was obeyed by the defendant, conclusively established the duty of the defendant to transfer the moneys to the Broadway Bank, and the right of the latter to receive them; and, moreover, it conclusively established against the Park

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Bank every fact necessary to sustain the issuing of such writ (*White v. Coatsworth*, 6 N. Y. 139; *Van Wormer v. Mayor*, 15 Wend. 262; *Mercein v. People*, 25 Id. 64, 106).

Townsend & Hyatt, and *J. W. Edmonds*, for respondent.

I. The money did not belong to the chamberlain, but to the city, or the county, or the public creditors in the sinking fund, or the parties who are interested in the court fund. When the money had been legally deposited, the chamberlain's responsibility for it ceased, and he could not make any profit out of it. By the deposit the owner of the fund becomes a general creditor of the bank (*Chapman v. White*, 6 N. Y. 412). Out of this relation grows the right of the bank to loan money deposited with it (*Commercial Bank v. Hughes*, 17 Wend. 94), so that all the right the Broadway Bank had or could have in the premises was that, in consequence of its being a general debtor to the owners of the fund, it could loan the money and receive profit on it. It had no right to compel the deposit to be made in its vaults, nor any right to demand interest from any other depositary.

II. If any one could have maintained a suit for either principal or interest of the fund, it could only be the owner or his agent (Story on Bailm. § 260). 1. No interest is recoverable on deposits in bank, unless by special agreement or usage known to both parties. 2. Neither the owners of these funds nor their agent, the chamberlain, could have recovered from the Park Bank any thing for the use of the deposits. 3. How, then, can the Broadway Bank have greater rights than they? And if the Broadway Bank recover in this action, what is there to protect the Park Bank from a recovery by the owners of the fund, or by their agent, the chamberlain?

III. This action, though in form for damages, is in reality for the recovery of interest on the deposits. Interest is never recoverable but as an incident to a debt (*Renss. Glass Factory v. Reid*, 5 Cow. 610), or as a measure of damages, and then only as incident to the principal of the damage (*Carlton v. Bragg*, 15 East. 226). It is never allowed in either case solely

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by itself, but only as such incident, so that when the principal is paid and received, there can be no recovery for interest (*Fake v. Eddy*, 15 Wend. 76; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Jacob v. Emmet*, 11 Paige, 142; *Williams v. Houghtailing*, 3 Cow. 86). It is never allowed on the principle of the use of the money, but only on the unjustifiable default of the debtor (*Renss. Glass Co. v. Reid*, 5 Cow. 587).

IV. But if it is not an action for interest, but for damages for the detention of the money, the damages sought to be recovered are too remote. They depend upon too many "ifs." 1. *If* the Broadway Bank had obtained the money; 2. *If* they had found borrowers enough; and, 3. *If* these borrowers had all paid up, they might have made a profit. Such damages only are recoverable as flow immediately and necessarily from the act (*Mayne on Dam.* (14), 92 Law Lib. 36; *Hauslip v. Padruick*, 5 Exch. 615; *Archer v. Williams*, 2 Carr. & Kirw. 26; *Griffen v. Culver*, 16 N. Y. 489; *Crain v. Petrie*, 6 Hill, 522; *Kennedy v. Ray*, 22 Barb. 511; *Sedgwick on Dam.* 78; *Blanchard v. Ely*, 21 Wend. 342).

BY THE COURT.—BRADY, J.—The plaintiff seeks to recover, as the assignee of the Broadway Bank, the damages sustained by the latter, in consequence of the refusal of the defendants to deliver or pay over the money on deposit in their bank belonging to the city and county of New York, to which they were entitled, having been selected as the depository of such fund by the city chamberlain. The claim for damages seems to rest upon the interest that would have been received upon the loans of the money, or some portions of it, and of which they were deprived by such refusal. There is no doubt that Mr. Devlin, the city chamberlain, as required to do by law (*Laws of 1860*, chap. 477), selected, in the exercise of his discretion, the Broadway Bank as the place for the deposit of the moneys belonging to the city and county of New York, and that the defendants holding them, as the depository selected by Mr. Devlin's predecessor, refused to transfer them to the Broadway Bank. It is not necessary to inquire into the causes of, or reason for, this

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conduct on the part of the defendants, inasmuch as the decision of the question involved in this case depends upon the abstract right of the plaintiff to recover upon the mere nomination of the Broadway Bank, as the successor of the defendants, for the purpose mentioned. It cannot be questioned, that the deposit of the funds in the bank, either of the defendants or the Broadway Bank generally, would make the owner of them a creditor of the bank (*Chapman v. White*, 6 N. Y. 412), and that though the city chamberlain, as legal custodian, determines the place of deposit, the fund is not his; the right of property in it is not changed by his act of deposit, and that the city and county of New York continues to be the owner. The Broadway Bank, therefore, from the time of its receipt only, would assume all the responsibilities growing out of its undertaking to safely keep it and duly pay all drafts upon it in the mode established by law. In reference, then, to the period for which the loss of interest or damages is claimed, the Broadway Bank had no duty to perform—no obligation to discharge—and no responsibility to bear. The loss of any benefit to be derived from the use of the money while thus detained, was a legal detriment, neither to the Broadway Bank nor to the city chamberlain, but to the owner of the fund. The city chamberlain could not withdraw it save in the manner specifically provided by law or ordinance. He could not, therefore, employ the money in any manner to his personal gain, and if he could not do so, he could not recover for any loss arising from the detention of the money. It may here with propriety be asked, if he could not successfully make such a claim, how is it possible for the Broadway Bank to do it? If the Broadway Bank are to be regarded as public officers at all, which is not admitted, it is as trustees of a fund with which they have no right to meddle, and the accumulations of which they could not appropriate. In addition to these objections it must be said, that if they were entitled to the possession of the moneys from the mere circumstance of their having been selected as the depository of the funds, it was their duty at once to take measures to obtain it. If their relations to the city chamberlain or to the city

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and county of New York began upon their selection as the custodians of the fund, they were placed under obligations which required an immediate exercise of their right to secure the fund against any contingency by which it should be endangered. Regarded as public officers, they would be remediless until they entered upon the discharge of their duties, which, as they related exclusively to the keeping and disbursement of the funds to be received, could not commence until the deposit was made in their bank. They were, however, under no obligation. Their responsibilities commenced when the moneys were deposited with them, and not before. The transfer of the fund to them was one of the duties of the city chamberlain, when he selected them as its custodians. Upon the argument of this appeal it was said, that this was an action which, in its nature, assimilated to the old action on the case, and that if the plaintiff was entitled to the possession of the fund, he could maintain it. This proposition cannot be sustained. There are cases in which a party having a bare possession of goods, which is *prima facie* evidence of property, may sue a wrongdoer who takes or injures them, although it should appear that the former has not the strict legal title. An action for injury to personalty may also be brought in the name of the person having only a special property or interest of a limited or temporary nature therein; but in this latter case the rule is, the party should have *had* the actual possession (1 Chitty's Plead. 71). The Broadway Bank never had possession of the money and the special property which would result from such possession, imposing, as it would, the care and protection of the fund, never existed. This is not a case either in which the Broadway Bank can sustain the demand made, upon the ground that they were bailees. A bailment is a delivery of a chattel for a specific purpose (Story on Contracts, § 682), and it appears, therefore, that they were not entitled to the possession of the money, by reason of any right of property, general or special, and that their limited interest in it is of no avail, because it was never placed in their custody. Having no general or special property which gave them the right of possession, this action must fail as an action

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on the case, considered with reference to the rules which govern such litigations. If the Broadway Bank has sustained any damage which does not appear, the maxim *damnum absque injuria* applies, and this action must fail. Whatever interest they had in the fund was contingent upon their receiving it, and was to commence only when the possession of it was acquired, as already suggested. The opinion of Justice Cardozo was correct, therefore, and the judgment directed by him must be affirmed.

MOSES FRANK v. JOHN H. MANNY.

Where the matters inquired about, upon the cross-examination, are directly connected with the subject of the inquiry of the suit, the answers elicited are not conclusive against the examiner; and he may, by other proof, contradict the testimony of the witness, (although he cannot impeach his general credibility and character.)

Whether the contents of a paper, though not the foundation of the action, but relating solely to a collateral fact, may be proved by parol—*query*.

A notice to produce a writing upon the trial will be good, although informal and inaccurate in some particulars—*e. g.*, the date of the paper—if it fairly apprize the party of the paper to be produced.

APPEAL by the plaintiff from a judgment of the Fourth District Court. The facts, so far as they concern the grounds of the appeal, are stated in the opinion of the court.

Levy Cohen, for appellant.

W. W. Northrop, for respondent.

CARDOZO, J.—Two questions only are presented by this appeal:

1. The appellant objected below, "that the defendant having cross-examined the plaintiff on new matter, not called out by the plaintiff, thereby made the latter his own witness, and

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could not impeach him." If, by this objection, the defendant meant to insist that when a witness called by one party is examined by the other on purely collateral matters—not in the least connected with the subject of the inquiry in the suit—the answers thus elicited are conclusive, because he cannot be permitted to confuse and embarrass the determination of the real question in the cause, by an effort to try issues which would be immaterial, the proposition is undoubtedly correct (1 Phillips' Ev. p. 272; *Howard v. The City Fire Ins. Co.*, 4 Denio, 502).

But the point has no application in the present instance, because the cross-examination was not within the rule mentioned. The matters inquired about were directly within the legitimate line of defense which the respondent sought, and had the right, to maintain.

But if, by the objection, the plaintiff meant to assert that although the matters inquired about were not within the rule to which I have adverted; yet that they were of such a nature, in view of the direct evidence, as to make the plaintiff the witness of the defendant, so as to preclude him from impeaching his character; then I have to say, without stopping to consider whether such was the line of examination, that, conceding it to have been so, no error was committed below in this respect. The defendant did not propose to impeach the character of the plaintiff, and the rule mentioned has no further extent than that a party cannot be permitted to assert, that the character of his own witness is such as to render him unworthy of credit. (The witness may be shown to be in error. The direct converse of what he testified to may be proven by other evidence; but his general credibility and character cannot be attacked. That is the only limitation which the rule relied upon imposes. /

2. I think there are several answers to the other point made by the appellant.

I should not be inclined to hold that the contents of a paper, even though it be not the foundation of the action, but relates merely to some collateral fact, may be proven by parol.

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I think the soundness in that respect of the case of *McFadden v. Kingsbury*, 11 Wend. 667, may well be doubted (see comments upon that decision by Messrs. Cowen and Hill, in their second volume of notes to Phillips on Ev., pp. 1211 and 1213).

But even if the notice to produce, which was given in this case, were insufficient, and I think it was not, because the fact of a settlement in writing, the production of which was desired, was the important point of the notice, and the date of the alleged settlement could scarcely have misled the plaintiff; and if the notice fairly apprize the party of the paper wanted, it will be good, although informal and inaccurate in some particulars. Yet I am of opinion that there are two conclusive answers to the plaintiff's objection, viz.: 1. The defendant did not give any evidence of the contents of the paper. He proved an independent fact—that, on a particular occasion, a balance was struck between the parties, and that the plaintiff was indebted to him between \$200 and \$300. This did not call for the contents of any paper. But, 2dly, if it did, the defendant testified that the plaintiff told him that the paper was lost. This was not contradicted by the plaintiff, and was therefore sufficient to justify the admission of parol evidence of its contents, without notice to produce it.

I think the judgment right, and that it should be affirmed.

EDWARD DEVELIN v. RHODA E. MACK and others.

The object of the Mechanics' Lien Law is to protect the mechanic, laborer and material man, and as between these persons and the owner, the equities of the former are superior to the latter, unless the latter's equities arise out of his contract with the contractor, affecting the right of the contractor to recover the contract price, or the amount that may be due him.

The Mechanics' Lien Laws, and especially the provision (Laws of 1863, chap. 500, § 13) declaring that no transfer of the contractor's interest should affect the right of any person entitled to file liens, operate as equitable transfers to a lienor of the money due to the contractor by the owner at the time of the filing his lien, against which nothing should prevail except that which should spring

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out of the contract itself, such as omissions from, or violations of, its obligations, affecting its performance, and consequently the amount due to the contractor.

Hence, where the owner retained, out of the sum due to the contractor, an amount to be held by her, as security, for a claim for damages in a suit pending between them in a matter having no reference to the contract for building, as to which a lien was filed by a sub-contractor: *Held*, that such retention must be regarded as a transfer, within the spirit of the provision of the act of 1863, which the contractor had no right to make, and which cannot destroy the equitable assignment of the fund due to the contractor, created by operation of the statute.

The right of the owner to set off a demand against the contractor, in an action by a sub-contractor to foreclose a mechanic's lien, discussed.

APPEAL by the defendant, Mack, from a judgment of the Seventh District Court. The action was brought by a sub-contractor to foreclose a mechanic's lien. It appeared on the trial that the owner, Mrs. Mack, employed Hammond to build a sewer. The job amounted to \$312.30, which was paid to Hammond, by Mrs. Mack, except \$100. At the time the \$312.30 became due, a suit was pending, brought by Mrs. Mack against Hammond and another person, for trespass in taking away certain flagging from the premises on which the sewer was built. Mrs. Mack claimed the right to retain the money due to Hammond for the sewer, on account of the damages sustained by her from the trespass. It was finally agreed that Mrs. Mack should pay all but \$100, and, that she should retain that sum as security for any judgment she might recover in that suit, which suit was pending and undetermined at the commencement of this action.

This agreement was made July 5, 1864, by which day the work was done. The plaintiff's lien was filed on the third of October following.

The owner filed objections to the claimant's demand. (1.) That the lien was not filed within three months. (2.) That the full amount due to the contractor had been paid him before the filing of the lien.

The justice rendered judgment for the plaintiff, from which the defendant, Mack appealed.

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Benedict & Boardman, for appellant.

I. That the agreement between the owner and contractor is binding at common law, is undisputed. It is for the plaintiff to show that the lien has altered the owner's rights. This he cannot do.

II. The lien law does not impair the legal or equitable rights of the owner, nor interfere with the right of the owner and contractor within the limits of good faith to modify the contract so long as no lien has actually attached, and when the lien has attached, the lienor is merely subrogated to the rights of the contractor against the owner as they exist at the time of filing the lien. It does not enlarge those rights. Any defense valid as against the contractor, would be valid against the lienor. The owner is liable to pay such amount only as is *due* by him to the contractor, and at the commencement of this suit nothing was due from Mrs. Mack to Hammond. He had no right of action against her, and therefore the plaintiff has none (Laws of 1863, sec. 9, *Miller v. Moore*, 1 E. D. Smith, 739; *Allen v. Carman*, Ib. 692; *Doughty v. Devlin*, Ib. 625).

H. P. Allen, for respondent.

I. The agreement proved was no defense.

(1.) The retaining the \$100 as security for the result of a law suit, was no payment. There is no pretense that it has ever been paid over, or even applied on account of that suit. (2.) The contract was in violation of the Mechanics' Lien Law in letter and spirit. By the statute (Law of May, 1863, § 1), the laborer and material man, "Shall have a lien for the value of such labor and materials," * * * "provided also, that no owner shall be required to *pay* a greater amount than the contract price." This means a *bona fide payment* of the money, according to the contract under which the work was done. (3.) Such an agreement, if tolerated, would be a gross fraud upon the laborer and material man. After the work had all been done, an owner and the contractor might collude together, and enter into an agreement by which the whole con-

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tract price might be retained as security for the result of a law suit, which might last five or ten years, and so practically the claim of the laborer or material man would be defeated, although not a dollar of the contract price had actually been paid; or after the work was completed, they might make a new agreement to postpone the payments for one or ten years.

II. Whether the new agreement, as between the parties to it, is binding upon Hammond, so as to have prevented him from filing a lien and enforcing it, is not material in this case. He could not postpone the rights of a third party, the laborer, to file his lien and enforce it. There is no analogy between the cases of *Miller v. Moore*, 1 E. D. Smith, 739, and *Allen v. Carman*, 1 E. D. Smith, 692.

Here, there was no debt due from the contractor to the owner. She made a claim against another party for the wrongful taking away of some flagging; and joined Mr. Hammond as a defendant for assisting him. The claim was extrinsic of the contract.

BRADY, J. Mrs. Mack, by agreement, dated June 15, 1864, employed Hammond, one of the defendants, to build a sewer. The work was finished on the 5th July following. During the period between the dates mentioned, Mrs. Mack commenced an action against Hammond and another to recover the damages sustained by her, in consequence of the removal by them of certain flagging from the premises on which the sewer was built, and insisted that she had a right to retain the money due to Hammond as an indemnity for the trespass committed. On the 5th July, 1864, it was agreed between her and Hammond, that she should pay all of the contract price but \$100, which sum she was to retain as security for the payment of any judgment she might obtain in the suit already mentioned. The plaintiff, on the 3d October, 1864, having performed work for the contractor, Hammond, in the construction of the sewer, filed his lien, and subsequently commenced this action to enforce it against the property of the defendant Mack. The justice rendered judgment in favor of the plaintiff, finding as conclusion of law, that no such agreement as the one mentioned to

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have been made between Mrs. Mack and Mr. Hammond, could be entered into "by which the just claim of the laborer and material man could be defeated." It is not pretended that at common law such an agreement was prohibited, and no evidence of collusion or fraud was given on the part of the plaintiff. The appeal, therefore, presents the abstract question whether the agreement mentioned is invalid by reason of any provision contained in the act of the legislature, passed May 5, 1863 (Laws 1863, p. 859). It is conceded that the only section of that act applicable to the facts disclosed, without reference to the general scope and design of the act, is the thirteenth, which provides that "no transfer or assignment of his interest in the contract by the contractor shall be valid as against parties entitled to file liens under said contract against said contractors." The object and design of the statutes relating to mechanics' liens was to protect the mechanic and laborer to the extent of his service toward the completion of the work done, and the material man to the value of the merchandise furnished by him. These laws have been administered generally upon the principle that the equities of the persons named are superior to those of the owner, unless his equities arose out of the contract itself, affecting the right of the contractor to recover the contract price, and as well the amount that might be due to the contractor. If the contractor, in other words, had performed his contract, and the compensation agreed upon were due to him, the lienors absorbed it, if sufficient in amount to produce such an effect. The legislature evidently intended that, if the money to be paid under the contract had been earned, the material man, laborer, and mechanic must be paid, although, extrinsic of the contract, the owner might have some claim upon the contractor, which, if allowed, would lessen the sum actually due to the latter; the reason for such an intention being, that, as the contractor's engagement were based upon the amount of his contract, his workmen and material men had the right to rest in security upon it, and the means provided by law to insure its application to their demands. In other words, the contract became at once a letter of credit and a security. (See *Telfer v. Kierstead*, 2 Hilton Rep. 577.) It was not absolutely so, however. The

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statutes required, and still require, proof that money is due to the contractor, in order that the owner shall, in no case, be compelled to pay more than the contract price. The statutes in question, including that of 1863, more particularly mentioned, in their operation are transfers to the lienors of the money due to the contractor, at the time of the filing of their respective liens, against which nothing should prevail except that which should spring out of the contract itself, such as omissions from, or violations of, its obligations affecting its performance, and consequently the amount due to the contractor. The sum retained by the defendant Mrs. Mack, was not detained by her in reference to any such matter or violation. It related to a claim founded on a different combination of facts, and which is, therefore, subordinate to the rights of the mechanic, laborer, and material man, whose payment by the statute is secured out of the thing he has created in whole or in part—the result of his skill, industry, or enterprise—and that agreement was, therefore, of no avail against him. This may seem greatly in derogation of the right of set-off and counter-claim, but the statute was intended so to operate. The provision of the act of 1863 extended the protection to the mechanic and others, by declaring that no transfer of the contractor's interest should affect the right of any person entitled to file liens, thus securing to the persons named all their rights during the period allowed for filing their respective claims. It is true, that the agreement set up by Mrs. Mack is not an absolute transfer or assignment, although it might become so, if she succeeded in her action against the contractor, but its effect, if sustained, would be to hold the lienors in *statu quo* until her action was determined, without any obligation, on her part, either to give notice to them of the agreement, until an action was commenced against her to enforce the lien claimed, or to expedite the determination of her action against the contractor. For these reasons the agreement made between Mrs. Mack and the contractor must be regarded as a transfer within the spirit of the act of 1863, which the contractor had no right to make, and which cannot destroy the equitable assignment of the fund due to the contractor, created by the operation of the statute.

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I am aware that some decisions of this court, while determining the construction to be placed upon, and the effect to be given to, the act of 1851, in relation to mechanics' liens (Laws of 1851, chap. 513) have upheld a set-off (*Allen v. Carman*, 1 E. D. Smith, 693; *Gourdier v. Thorp*, Id. 697; *Miller v. Moore*, Id. 742; *Owens v. Ackerson*, Id. 691), but it has not been decided in any case that I have been able to find, that a defense, by way of set-off or counter-claim, would be available to the owner in an action against him by a sub-contractor (see opinion of Judge Woodruff in *Miller v. Moore*, *supra*, pp. 741-742), but in *Miner v. Hoyt* (7 Hill, 525), which was an action predicated of the lien law of 1830, Senators Lott and Sherman expressed the opinion that it could not be. In *Owens v. Ackerson*, *supra*, the plaintiff was the contractor, and the right of the owner to abate his claim could not well be disputed. In *Miller v. Moore*, the set-off existing on the contract was made before the passage of the law, and the owner's claim was allowed on that ground; in *Gourdier v. Thorp*, the action was by the contractor against the owner, and the answer to the plaintiff's demand was, that the work was not skillfully performed, and the defense, therefore, grew out of the contract itself; and in *Allen v. Carman*, the rule established was, that crediting the contractor with the amount of his debt to the owner existing when the contract was made, before the lien was filed, was equivalent to a payment. It must be borne in mind, however, in relation to these cases, that the act of 1851, *supra*, under which they were instituted, provided, by its fifth section, that "a bill of particulars of any offset which might be claimed should be served on the laborer, &c.," and thus impliedly declared that the owner should be protected as to any such demand. There is no such provision in the act of 1863. The word offset is not employed in that statute, and it would seem from its general character that it was the intention to exclude it as a defense by the owner, at least when prosecuted by a sub-contractor, whose lien attaches when the work to be done by him is commenced. In rendering his services he secures his compensation by a lien upon the thing done, as before suggested. It will appear, also, that by the first section of the act of 1863, the lien of the la-

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borer, mechanic, and material man is declared, "notwithstanding any sale, transfer, or incumbrance made or incurred at any time after the commencement of the work, or furnishing of materials; provided, that all mortgages given in good faith for full value, which shall have been executed and recorded at any time *prior* to any *actual work done* or materials furnished, shall not be affected or impaired by such lien"—provisions which exhibit an intention on the part of the legislature to place a guard around the lien, which, though it may be oppressive in some respects to the owner, is certainly liberal to the lienor. It will be found, also, that Senators Lott and Sherman, in the case of *Miner v. Hoyt*, *supra*, expressed views of the general design of the mechanics' lien law corresponding with those herein uttered; and that this case stands alone, from the fact that there was no absolute application of the money in Mrs. Mack's hands to any purpose. Her claim was not admitted by the contractor, and whether it ever will be established is a matter about which no opinion can be expressed here.

DALY, F. J., concurred.

CARDOZO, J. I concur with Judge Brady, that, under the provisions of the present statute, the transfer made in this case cannot affect the rights of the lienor; but I differ entirely from his views of the effect of the decision in the case of *Miner v. Hoyt*. I think that case is an authority for the proposition that, under the acts of 1830 and 1832, the owner would be entitled to be allowed for all demands he held against the builder at the time the attested account was served, provided they were such as might have been set off in an action brought by the builder himself. I think a careful and critical analysis of the case will show this to be the fact.

Judgment affirmed.

Murray v. Clarke.

PATRICK G. MURRAY v. BENJAMIN G. CLARKE *and another*.

The plaintiff, who was a guest at the defendants' hotel, on the eve of his departure therefrom, surrendered his room, and at the same time requested the defendant's clerk to take charge of his valise during a short absence from the city, when he would return and pay his bill. The valise was taken charge of, and a brass return check was given therefor to the plaintiff. On the plaintiff's return, several days afterward, he registered his name, and was assigned a room, intending to remain some days. On calling for his valise, and presenting the return check, it was ascertained that the only valise in the baggage room, bearing the number of the plaintiff's check, was not the plaintiff's valise, which could not be found. *Held*, that whether regarded as an ordinary bailment, or as property in the defendants' hands, which they had a right to detain until the lien upon it was discharged, the defendants were bound to the exercise of ordinary care and diligence; and the burden was upon the defendants to show the circumstances of the loss. In default of any such affirmative proof by the defendants, the presumption will arise that the defendants were guilty of negligence.

APPEAL by the defendants from a judgment of the First District Court.

The facts are fully stated in the opinion of the court.

Marsh, Coe & Wallis, for appellants.

Frederick Smyth, for respondent.

BY THE COURT.—DALY, F. J.—The testimony in the case being conflicting, we must assume that the justice found the plaintiff's statement to be true in every particular in which it differed from that of the witnesses for the defendants. It appeared that the plaintiff came to New York on the 26th of July, 1865, and stopped at the Merchants' Hotel, kept by the defendants, and remained there as a guest for three or four days; that he was going to Jersey City to see a gentleman, and determined to give up his room at the hotel; that he went to the office of the hotel, where he saw the general clerk of the defendants, and gave up his room, telling the clerk that he was going away. He gave the clerk his valise. The clerk came

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from behind the desk, and sent a porter with the valise, who brought back a brass check, which the clerk gave to the plaintiff at the office; upon which the plaintiff left, without paying his bill, intending, as he testified, to return. Upon going to New Jersey, he found that the person whom he wished to see had gone to Buffalo, and, without returning again to the hotel, he went to Buffalo, and in about eight days thereafter he returned to the defendants' hotel, registered his name, a room was assigned to him, and he asked for his valise, delivering up his check. A valise was brought to him, the brass check upon which corresponded with the one that had been given to him, but it was not his valise. A search was made in the baggage room, but his valise could not be found. The valise which had been produced as his was then opened, and it was found to contain a soldier's cap, a pair of pantaloons, and one or two other articles; while his contained a variety of articles, collectively valued at \$125.

The plaintiff was himself a hotel keeper in the city of Washington, and as he left his valise with the intention of returning, without paying his bill, it may be a question, as the relation of innkeeper and guest existed when he left, whether it did not constructively continue during the period of his temporary absence (*Grinnell v. Cook*, 3 Hill, 490; *Robinson v. Walter*, 3 Bulst. 269; *York v. Greenough*, 2 Ld. Ray. 688; 1 Salk. 388; *Mason v. Thompson*, 9 Pick. 280; *Wintermute v. Clark*, 5 Sandf. S. C. 247; *Morris v. The Third Avenue Railroad Co.*, 1 Daly, 205). But it is not necessary to pass upon that question. The plaintiff, upon leaving for New Jersey, put his valise in charge of the general clerk of the defendants; and they had a lien upon it for the plaintiff's entertainment, as his bill had not been paid. Whether regarded, therefore, as an ordinary bailment, or as property in the defendants' hands, which they had a right to detain until the lien upon it was discharged, the defendants were bound to the exercise of ordinary care and diligence. If they could not produce it when required, it was for them to show how it had been lost; and if they could not explain the manner of its loss, the presumption would be that it was lost through their negligence, unless they

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proved that they had exercised all the care and diligence that could be expected from them under the circumstances (*Arent v. Squire*, 1 Daly, 347). It was not, however, necessary in this case to rest upon any such presumption, for it was in evidence that the duplicate brass check was upon another valise than that of the plaintiff;* and the justice was warranted in concluding, from this circumstance, either that the defendants' agent had checked this valise as the plaintiff's, by mistake, or that through the want of proper care and vigilance on the part of the defendants' agents, some other person had been able to transpose the checks in the baggage room; and that in this way, by the negligence of the defendants' agents, the plaintiff's valise had been delivered to another. It was for them to explain how this circumstance occurred; and if they could not, it was to be taken as affirmative proof of negligence on the part of their agent.

The judgment should be affirmed.

BARNET L. SOLOMON *et al.* v. THE PHILADELPHIA AND NEW YORK
EXPRESS STEAMBOAT COMPANY.

The responsibility of a common carrier continues in full force until notice of the arrival of the goods is given to the consignee, and a reasonable opportunity is afforded to remove them.

What is a reasonable time for a consignee to send for goods after notice of their arrival, is a question of fact. And the court having found, as a matter of fact, that notice was received Saturday morning, and that the next Monday morning was a reasonable time for the consignee to send for the goods—*Held*, that such finding will not be disturbed on appeal.

One who sends a notice through the mail, instead of by a messenger, must bear the consequences of any delay in the receipt of the notice by the party to whom it is directed, not occasioned by such party himself. Any inference as to the day when a notice sent by mail was delivered, which may be drawn from the fact that it was mailed on a particular day, is overborne by evidence of its receipt upon a different day.

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APPEAL by defendants from a judgment of the Marine Court at general term.

The action was brought to recover damages which eight boxes of paper hangings had sustained while in the possession of the defendants as common carriers. The defendants' steamer reached New York Thursday evening, and the goods were discharged on Friday. The defendants mailed a notice to the plaintiffs (the consignees) on Thursday night, notifying them of the arrival of the goods, and requesting them to call and receive them. This notice was not received by the plaintiffs until Saturday, which was a wet, stormy day, and the goods were not called for until Monday, and then found to be greatly injured by water.

Beebe, Dean & Donohue, for appellants.

Henry Morrison, for respondents.

BY THE COURT.—CARDOZO, J.—I do not understand how the justice arrived at the sum for which he rendered judgment. On the testimony returned, the verdict ought not, in any way that I can see, to have exceeded about \$145; but as no point to that effect is taken in the notice of appeal, it may be that there was some other evidence which justified the finding; and as the defendants seem to acquiesce in the amount, if the verdict be right at all, I think we are not called upon to reduce the judgment. In other respects, this strikes me as a very plain case. The defendants were held liable below for damages which paper hangings belonging to the plaintiffs sustained while in the defendants' possession, they having, as common carriers, undertaken to transport the goods from Philadelphia to New York. The property, which was in good condition when it was delivered to the defendants, was addressed to "B. L. Solomon & Sons, New York." The steamer "Bristol," which carried this property, reached this city on Thursday, the 24th of March, 1866. The goods in question were discharged from the boat on Friday, the 25th. There was a conflict of evidence as to whether it rained on Friday night, but it was

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undisputed that on Saturday there was a severe rain storm. When the vessel was unladen on Friday, these goods were placed upon the dock, and there they remained during the storm, and up to Monday morning, when the plaintiffs' cartman took them away. It was asserted that they were covered with tarpaulin, but at all events they were wet and damaged. Perhaps the testimony to prove the amount of damage was not strictly of the right character, but it was given in the form it was without objection, and no point upon it is noted as having been made on the motion for nonsuit; therefore it must on appeal be considered sufficient.

Until notice of the arrival of the goods, and a reasonable opportunity to the plaintiff to remove them, the responsibility of the defendants as common carriers continued in full force. When notice was given was a question as to which there was conflict in the testimony, and of course the justice found in accordance with the plaintiffs' theory, that they received it on Saturday, between ten and eleven o'clock, A. M., no matter when it might have been mailed to them. I am of opinion that the justice was right in this conclusion, because Mr. O'Grady swore positively that the notice was left at the plaintiffs' store on Saturday morning, between ten and eleven o'clock. This positive testimony of the time when the notice was received at the plaintiffs' store should outweigh the inference sought to be drawn from proof that the notice was mailed on Thursday, because, even if that were so, it might very well happen that through accident at the post-office or neglect of the carrier, it might not reach its destination until Saturday; and as the defendants saw fit to take the chance of the mail, instead of sending a messenger to the plaintiffs' store, they must bear the consequences of any delay not occasioned by the plaintiffs themselves in the receipt of the notice. But it is enough that, upon conflicting evidence, the justice has found in favor of the plaintiffs upon this point, or at least that in support of the judgment we must presume that he did so. Was Monday then a reasonable time for the plaintiffs to send for the goods after they had received the notice? That was a question of fact (*Cary v. The Cleveland & Toledo R. R. Co.* 29

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Barb. 49), and I think it clear that the justice must have found as a fact, that notice of the arrival of the goods reached these plaintiffs on Saturday, between ten and eleven, A. M., which was a very stormy day, and the next Monday morning was a reasonable time for the plaintiffs to send for their property. Indeed, it would have been most unreasonable and reckless to have attempted to remove that class of goods during a stormy day like that Saturday is shown to have been.

The judgment should be affirmed.

MARY M. BERWICK *and others* v. CHARLES DUSENBURY *and wife*.

There is nothing growing out of the relation of husband and wife which prohibits the latter acting as the agent of her husband.

Where a married woman, in the absence of her husband and without any express authority, had hired apartments for a year from, and taken possession on, the 1st of May, and her husband, returning on the 6th, occupied the apartments with her up to the 23d or 24th day of that month, when they left,—*Held*, that the husband was liable for the rent, as having, by his delay in not repudiating the contract made by his wife, adopted and ratified it.

APPEAL by the defendants from a judgment of the Seventh District Court. The action was brought for rent for the month of June, 1866, of certain premises, which had been hired by Mrs. Dusenbury, in the absence of her husband and without his authority, from the plaintiffs, for one year from May 1, 1866, on which day she went into possession. Her husband returned on the 6th day of the same month, and, without notifying the plaintiffs that he repudiated the contract of his wife, occupied the premises with her till May 23 or 24, when they vacated the premises. The justice rendered judgment for the plaintiffs for the full amount claimed, from which judgment the defendants appealed.

Ira D. Warren, for the appellants.

A. H. Reavey, for the respondents.

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BY THE COURT.—BRADY, J.—It may be assumed that the defendant's wife had no authority, express or implied, to hire the premises from the plaintiff, and yet the judgment rendered herein must be sustained. The defendant's wife took possession of the premises on the 1st of May, 1866, and the defendant, when he returned on the 6th of May ensuing, also went into possession of them, and remained until the 23d or 24th of the same month. He did not, for aught that appears, during his occupancy in any manner advise the plaintiff or his agent that his wife had acted without authority, and that he did not intend to ratify the contract she had made, nor did he do any act indicative of a similar intent. He said on the trial that he refused to keep the premises, and moved out on the 23d or 24th of May. His removal was too late. He had, by his delay, ratified the contract made by his wife. The doctrine on that subject is clearly stated in Story on Contracts, section 161, on the authority of adjudged cases, as follows: "It is not necessary that the ratification should be express and formal, unless the agent act in the name of the principal by an instrument under seal, in which case the ratification must also be under seal, but it may arise by implication from collateral circumstances, from the acts of the principal, or from his silence and acquiescence when it was incumbent on him to object, or when the presumption of a ratification is the only satisfactory explanation of such silence." There is nothing growing out of the relation of husband and wife which prohibits the latter from acting as agent of her husband, and, if her act as such be approved, that approval is equivalent to an original authority (*Hopkins v. Molineux*, 4 Wend. 465). It makes no difference where the act has been adopted, whether the person acting for another was authorized, but exceeded his power, or assumed to be authorized, when, in fact, he was not clothed with power directly or indirectly (Story on Agency, § 253; *Nixon v. Palmer*, 8 N. Y. 398; *Commercial Bank v. Warren*, 15 N. Y. 577; *Wilson v. Turnman*, 6 Mann. & Gran. 236), and as we have seen that the principal may be held to have assumed the obligation made for him by his silence or acquiescence, he is required to disavow the act done in his name within a reason-

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able time (*Cairnes v. Bleecker*, 12 Johns. 300; 2 Kent's Com. 616; *Benedict v. Smith*, 10 Paige, 127; *Vianna v. Barclay*, 3 Cowen, 281; *Gage v. Sherman*, 2 N. Y. 417; *Bridenbecker v. Lowell*, 32 Barb. 9), and particularly where, as in this case, he availed himself of the benefit of the contract made for him by occupying the premises. When the act done for another is apparently for his benefit, slight evidence should serve to establish a ratification (*Commercial Bank v. Warren*, *supra*, p. 579). There seems to be great propriety in applying such a rule strictly to a case like the present, in which it appears that the wife, during the absence of her husband, hired a dwelling, which may be classed as one of the necessities of life. In this case, however, the ratification is abundant. The defendant followed his wife to the premises hired and occupied by her, and remained there, as already shown, for eighteen days. These were acts from which no other conclusion was to be drawn by the landlord than that he intended to remain for the term secured. As said by STRONG, J., in *Gage v. Sherman*, *supra*, "if the defendant intended to object to the terms of sale he should have acted promptly. The plaintiff might then have taken his land back, and, probably, without loss." The justice, in this case, held, that the delay of the defendant, in reference to the repudiation of the contract, having taken possession of the premises as he had, was unreasonable, and we think it was. He should have acted promptly, and restored the possession to the landlord.

The judgment should be affirmed.

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RICHARD S. ROBERTS v. DITUS C. SHEPARD *and others.*

A copartnership agreement provided that either partner might dissolve and close up the copartnership, upon the failure of the other partner to contribute his proportion of the capital. *Held*, that this clause, in the event of such failure, conferred sufficient authority upon the first partner to execute a general assignment of the firm's property, for the benefit of creditors, especially where there is evidence that the delinquent partner knew of, and consented to, the assignment.

A sale upon credit of part of their property by an insolvent firm is a circumstance which may be considered, with others, as bearing upon the question of a fraudulent intent, but alone does not necessarily establish it. And where it appears that the property was sold upon a usual credit, to a responsible person for its reasonable value, and that the debts preferred by the assignment subsequently made, were honestly owing, and nothing appears but that there was other property of the insolvents not covered by the sale, the court will not overrule the finding of the referee, that the sale and assignment had not been made with intent to hinder, delay, or defraud creditors.

APPEAL by the plaintiff from a judgment entered on a report of a referee. The facts are stated in the opinion of the court.

Titus B. Eldridge, for appellant.

John W. Edmonds and *E. J. Spink*, for respondents.

BY THE COURT.—CARDOZO, J.—The defendants Chollar and Peters entered into copartnership to carry on business in the city of New York, under the firm of Justus Chollar & Co. Peters was to contribute \$14,000 in cash, as capital, but failed to do so. Chollar agreed to and did contribute \$1,000. By the articles of copartnership, it was stipulated, that if either party should neglect or refuse to pay the capital he had agreed to contribute, "the other party might have the privilege of dissolving and closing up the copartnership without the hindrance of the party so failing." On the first of February, 1860, after many ineffectual efforts to keep the partnership

alive, Chollar, who was the managing partner (Peters residing and being most of the time out of the city) having returned to the sellers some \$8,000 or \$10,000 worth of goods which had been recently purchased for the firm, sold to one Lewis, a man of pecuniary responsibility, the balance of the stock and fixtures of the concern, at about their fair value, taking his notes in payment, becoming due at intervals between eight and eighteen months. On the 2d of February, 1860, Chollar (Peters being absent) executed in the name of the firm, in his own name, and in the name of Peters by Chollar, a general assignment of the partnership property, making some preferences. The plaintiffs having obtained judgment against the firm, and executions thereon being returned unsatisfied, brought this suit to set aside the assignment, and they make two points against its validity, viz.: 1st. That Chollar had no authority from Peters to execute it; and 2d. That it was made with intent to hinder, delay, and defraud creditors.

The defendant Peters had failed to pay in his promised capital, and thereby, by the terms of the articles of copartnership, the defendant Chollar was authorized to close up the business without hinderance from Peters. Beyond this, the proof shows that Peters was consulted by Chollar, and authorized the making of the assignment, never complaining until after it was executed, and then principally objecting because he had not selected the assignee. He told Chollar that they must keep faith with Shepard, whom they had promised to protect, and that, if a certain trade could not be affected, "he, Chollar, must make an assignment," that "he, Chollar, must do the best he could, and that he Peters, left it all to him, Chollar."

I have no doubt that this was sufficient authority for Chollar to execute the assignment (*Welles v. March*, 30 N. Y. 344). Was the assignment made with a fraudulent intent, and therefore void?

It was argued that the sale of a portion of the stock and the fixtures, upon credit, after the insolvency of the firm, and in contemplation of the assignment, had the effect to delay the creditors, and that for that reason the assignment was fraudulent, and it was claimed that *Ruhl v. Phillips*, decided in this

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court, in February Term, 1866,* is an authority for that proposition.

It must be remembered, that every delay to which a creditor is put in the collection of his debt, is not necessarily fraudulent. Insolvency does not deprive a trader of the right to sell his property, and if the sale be made in good faith, without any intent to hinder, delay, or defraud creditors, the mere fact that it is made upon credit, does not always require that it should be declared invalid. *Ruhl v. Phillips* differs essentially from this case, in the fact that there the insolvents sold out all their property of every character, upon a long credit, and, as the necessary effect of such a sale was to delay the creditors until the credit expired, it was held that that delay was the object of the sale, and that therefore the transaction was fraudulent. But no such conclusion necessarily follows, when the sale is only of part, and not of the whole, of the property of the insolvents. In the present case, the proof does not show, and the complaint does not charge, that all the property of the firm was sold on credit. The remnant of the stock and the fixtures of the store were sold, but for aught that appears, there might have been a large amount of other property belonging to the firm, which could have been reached immediately. The burthen rested on the plaintiffs to show such a sale as marked the transaction as fraudulent, and therefore if it were true that the sale to Lewis covered all the property of the firm, it was for them to make that fact appear affirmatively.

A sale upon credit of part of their property, by an insolvent firm is a circumstance which may be considered, with others, bearing upon the question of fraudulent intent, but alone does not necessarily establish it; and when, as here, the evidence shows that the property was sold upon a usual credit, to a person of undoubted responsibility, for all that it was reasonably worth, and that the debts preferred by the assignment were honestly owing, and that the assignor, before making the assignment restored to persons from whom purchases had

* *Ante*, 45.

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shortly before been made, goods to the amount of \$8,000 or \$10,000, which a dishonest debtor would have been likely to keep and appropriate, and nothing appears to show but that there was other property of the insolvents not covered by the sale, we cannot say that the referee drew an erroneous conclusion of fact when he held that, upon all the evidence, it was not proven that the insolvent had been actuated, in making the sale and assignment, by an intent to hinder, delay or defraud creditors. I think the judgment should be affirmed.

Judgment affirmed.

SYMMES GARDNER v. SYLVESTER LAY.

The plaintiff, during the pendency of the action, petitioned for his discharge as an insolvent debtor, and afterward suffered a default to be taken in the action, and a judgment for costs was rendered against him before his final discharge as an insolvent. The defendant procured an order for the plaintiff's examination as a judgment debtor, under section 292 of the Code of Procedure, which the plaintiff moved to set aside, on the ground of his discharge as an insolvent, and on the further ground that the judgment by default was taken in violation of a verbal agreement between the parties.

Held, That the plaintiff was not discharged from the judgment by the insolvent discharge.

Although the court will not, in general, decide upon the validity of an insolvent's discharge by affidavits on motion, yet, where the only question is, whether a discharge, admitting it to be valid, operates to discharge a particular judgment, and there is no question as to the facts, the court will not put a party to an action upon the judgment to determine that question.

A parol agreement between the parties to a suit that the action should be discontinued without costs, and that, therefore, a judgment dismissing the complaint with costs, against the plaintiff, was a surprise to him, are not grounds for vacating an order for the plaintiff's examination on proceedings supplementary to an execution on such judgment. The remedy is by an application to open the judgment.

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APPEAL by the defendant from an order vacating an order for the examination of the plaintiff as a judgment debtor on proceedings supplementary to execution.

On the 20th day of February, 1861, the plaintiff petitioned, under the Two-third Act, for his discharge as an insolvent debtor. In March of the same year, in a suit pending at the time of the petition, the plaintiff suffered a default, and the defendant dismissed the complaint, and entered a judgment against the plaintiff for \$110 costs. In the following November, the plaintiff was discharged from his debts. The defendant procured an order for the examination of the plaintiff on supplementary proceedings, which the plaintiff moved to vacate, on the ground of the discharge, and on the further ground that the judgment of dismissal had been taken in violation of a parol stipulation. The motion was granted, and the defendant appealed.

Sylvester Lay, for the appellant.

John E. Parsons, for respondent.

BY THE COURT.—DALY, F. J.—The statement of the plaintiff, that the defendant agreed that the suit might be discontinued without costs, and that the judgment was therefore a surprise upon him, is declared by the defendant to be untrue, and the defendant's affidavit is substantiated by the facts detailed in the affidavit of the plaintiff's attorney. But even if such an agreement had been made, it would not entitle the plaintiff to have the supplementary order set aside. His remedy would be to apply to the court to open the judgment, and it would depend upon the result of that application, whether the supplementary order could be discharged or not.

There was no debt owing by the defendant to the plaintiff, nor any such contingent liability as the statute has provided for (2 R. S. p. 22, sec. 32, p. 17, sec. 5), when the plaintiff petitioned for his discharge. The order for the appearance of creditors, and directing notice to be served upon them personally, or by mail, was made on the 26th of February, 1861.

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Long anterior to that, the plaintiff brought an action of trover against the defendant, which action was pending when the plaintiff petitioned for his discharge. The plaintiff having failed to prosecute the action, the defendant, when the cause was reached upon the calendar, took an order dismissing it, and entered up a judgment for his costs. The judgment was entered up on the 14th of March, 1866, and on the 14th of November, 1861, the plaintiff obtained his discharge as an insolvent. When the judgment was entered, it became a debt of record, and the defendant did not, until then, become a creditor of the plaintiff. If the plaintiff had petitioned for his discharge, after this judgment was entered, the judgment, though in tort, would be a debt to be included in the petitioner's schedule (*Ex parte Thayer*, 4 Cow. 66; *Hayden v. Palmer*, 24 Wend. 364), and it would have been necessary to serve notice of the order to show cause upon the defendant as a creditor.

But when the plaintiff obtained the order for his creditors to show cause why an assignment of his estate should not be made, and he be discharged from his debts, the defendant was not a creditor. No claim, demand, debt, or any such contingent liability as the statute has provided for, was then in existence. The defendant could not have united with the other creditors in petitioning for the plaintiff's discharge, nor could the plaintiff have included him in the schedule of his creditors. The sum owing to each creditor is to be stated in the schedule (2 R. S. 17, sec. 5), which could not have been done, as there was no sum owing; the debt, which was created by the entering of the judgment, having arisen afterward, through the plaintiff's failure to bring his action to trial. The plaintiff, when he made his application, did not regard the defendant as a creditor. He did not include him in the schedule, nor was any notice served upon him. Upon this state of facts, it is very clear that the judgment was not affected by the plaintiff's subsequent discharge as an insolvent. The case of *Wilkins v. Warren* (14 Shepley, 438) is in point. There, a person commenced a suit, and, while it was pending, he became a bankrupt. He afterward failed to maintain his action, and judgment was rendered against him for costs. In an action of debt upon that judgment, it was held that his bankruptcy furnished no defense.

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In *Kellogg v. Schuyler* (2 Denio, 73), it was held that a judgment, rendered after the defendant had presented his petition in bankruptcy, was not affected by the subsequent discharge of the defendant as a bankrupt, and to the same effect are *Ingersoll v. Rhoades* (Hill & D. Supp. 371), and *McNeilly v. Richardson* (4 Cow. 607), and *Rose v. Briggs* (7 Wend. 70), in relation to discharges under our insolvent laws.

Where, however, the debt is in existence when the debtor applies for his discharge, as where it is in the form of a promissory note, and before the discharge, judgment is rendered upon the note, the discharge may be pleaded to an action upon the judgment (*Clark v. Rowling*, 1 N. Y. 316), because the court, looking beyond the judgment, can see that a debt existed when the application was made, which would have been reached by the discharge, and which is reached by it, notwithstanding that the debt has been merged in a judgment; a very different case from the one under consideration.

The decision of the court, at special term, would seem to have been made upon the ground that the defendant would have to bring an action upon the judgment, to enable the court to pass upon the question raised. An action upon the judgment, on the framing of an issue, is necessary where the judgment creditor sets up that the discharge is void for any of the causes enumerated in the thirty-fifth section, 2 R. S. p. 23 (*Stuart v. Salhinger*, 14 Abb. 291). The court will not decide such a question on a motion by affidavits, but will require it to be tried by a jury, before whom the witnesses can be orally examined and cross-examined. It will not, said Cowen, J., in *Dey v. Van Valkenburgh* (5 Hill, 245), receive affidavits to show that the discharge was void for causes mentioned in the statute, as it distrusts the force of such proof, and turns the party over to a more satisfactory mode of examining the question. But in this present case the discharge was not impeached, nor was any question raised as to its validity, either upon the ground of fraud, or for the want of regularity in the proceedings, or for any other cause. The ground taken was, that though a good and valid discharge under the act, it did not operate to discharge this particular judgment. There was no question as to the

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facts. The point presented was simply a question of law, arising upon an undisputed state of facts, which could be decided quite as well upon a motion as in any other form of proceeding. If there is no question as to the integrity of the discharge, but the point presented is whether it affects a particular judgment, there is no occasion to put the party to an action upon the judgment, as such a question can be disposed of upon a motion (*Mechanics' Banking Association v. Lawrence*, 1 Sand. S. C. R. 659; *Parkinson v. Scovill*, 19 Wend. 150). The order appealed from should therefore be reversed.

Order reversed.

WILLIAM C. BROWNING *and others* v. THE LONG ISLAND RAILROAD COMPANY.

The obligation of a common carrier to notify the consignee of the arrival of goods, and of the place of their deposit, and to safely store them after arrival if the owner cannot be found, can be varied only by an express contract, or by a uniform and well-known usage establishing a mode of delivery in certain cases, or at particular places, in conformity with which the parties may be presumed to have contracted.

On the trial of an action against a railroad company for the loss of goods transported by it, it appeared that the servants of the company had placed the goods upon an open and exposed platform at the place of destination, from which they were stolen, no notice of their arrival having been given to the consignee. The defendant offered to show that, by a well known and long established custom of the company, goods were deemed delivered when safely deposited at the platform of the station; and were considered, by the custom and printed rules of the company, to be thereafter at the risk of the owner. *Held*, that the offer was properly refused, on the ground that if such a custom were admissible, it would not have been available, as the goods in this case were not "safely deposited" at the platform, without which no foundation was laid for the proof. *Held further*, that it was proper to exclude an offer to show that where freight was required to be paid for in advance, as in this case, it was the well known and long established usage for the shipper to notify the consignee of the shipment of the goods, and for the consignee to come for his goods without notice of their arrival by the company; for if such a custom prevailed, it would not excuse the defendant for the want of proper care until the consignee could come an

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get his goods; nor could such evidence be material in any case, it seems, unless the defendant could show that it was through the shipper's negligence in not giving notice, or through that of the consignee in not acting upon it, that the property was lost or injured.

A regulation or usage of a railroad company requiring all claims against it for damages, by reason of loss or injury to goods transported by it, to be made within ten days after the delivery at the station,—*Held*, unreasonable; and that an offer to prove it was properly rejected.

APPEAL by the defendants from a judgment of the Marine Court at general term.

This action was brought to recover the value of certain goods transported by the defendants. On the 25th day of August, 1864, the plaintiffs shipped by the defendants' road one case of clothing directed to "C. W. Collyer, Hicksville," which was delivered, with other goods, by the defendants' servant upon the platform at Hicksville, on the 27th day of August, in good order and condition. The defendants did not notify Collyer of the arrival of the goods; but he was informed by his brother that they were at the station two days after their arrival, and going for them, found that the case had been broken open, and part of the goods stolen. A short time before, the freight and station house of the defendants at that station had been burned. On the trial, before Justice Hearne, without a jury, the defendants moved for a dismissal of the complaint on the grounds:

First.—That the plaintiffs have given no legal evidence of the value of the goods.

Second.—That it appeared, by their own showing, that the goods in question had been delivered, as required by the allegations of the complaint.

Third.—That the mere fact of the breaking open and stealing of the goods, after the delivery at Hicksville station, does not in itself fasten any liability on the defendants.

The court denied the motion, and the counsel for the defendants excepted. The justice gave judgment for the plaintiffs.

S. B. Noble, for appellants.

A. Prentice, for respondents.

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BY THE COURT.—DALY, F. J.—The plaintiffs delivered to an agent of the defendants a box containing materials cut, with the trimmings, for the making of army clothing, marked "C. W. Collyer, Hicksville." Hicksville is one of the regular stations upon the defendants' road. It contains a store and a blacksmith's shop, close to the railroad track, with a number of private houses and stores about it. The defendants had had there a freight house, a ticket office, and station house, all of which had been destroyed by fire a short time before this box was received for transportation. The freight house had been used for storing freight left at the station, but the company had had no freight agent there. Parties came to the station and got their goods, which were sometimes put in the freight house; and when goods were brought there to be sent by the cars, the ticket agent, it would seem, took the charge of them, and put them on the cars.

The plaintiffs' box was received in good order, and it was delivered in the same state, by the defendants' conductor putting it, together with other goods, upon the platform at the station. No notice of its arrival was given by the defendants to the consignee. Two days after the box was delivered, as above stated, the consignee heard from his brother that it was at the station; and upon the same day he went there, and found the box, which had been left during all this time exposed upon the platform, broken open, and the materials for the making of thirty-two pairs of pantaloons been taken from it.

These facts having been proved, the defendants offered to show that, by a well known and long established custom of the defendants, articles were deemed delivered when safely deposited at the platform of the station, and were considered and deemed, by the custom and the rules and regulations of the road, to be thereafter at the risk of the owner. If any such custom could have been proved, it would not have been available, as this box was not safely deposited at the platform, but was left there openly exposed, subject to be injured by the elements, or to be rifled, as it was, by thieves. Such a custom, if it had arisen and was universally known, must have pre-

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vailed, in connection with the existence there of a freight house, for the preservation and security of property, until the owner or consignee could come and take it away. While the freight house was there, it could be "safely deposited at the platform;" but the freight house was destroyed by fire about three weeks before this, and as that security for a safe deposit did not then exist, it was incumbent upon the defendants, before they could relieve themselves of their liability as common carriers, to find some other means whereby the goods could be secure and safe from depredation until they could be removed.

The defendants further offered to show that, by a long established usage of the road, and in accordance with its printed rules and regulations, posted conspicuously at the place for receiving and discharging freight, it was not incumbent upon the defendants to notify the consignee; but that, when articles were deposited *safely* upon the platform of the station to which they were consigned, they were, by the usage, and by these rules and regulations, at the risk of the owner. To which offer it may be answered, as above, that this box was not "deposited safely," without which no foundation was laid for the proof of any such custom.

The defendants then offered to show that, when freight was required to be paid in advance, which was the case here, it was the established usage for the shipper to notify the consignee of the shipment of the goods; and when the consignee lived at a distance from the station, that he was to come for the article consigned to him, without notice from the defendants. If such a usage prevailed, it would not excuse the defendants for the want of proper care until the consignee could come and get the property; nor could such evidence be material in any case, unless the defendants could show that it was through the shipper's negligence in not giving the notice, or through that of the consignee in not acting upon it, that the property was lost or injured—which was not attempted to be done in this case.

The conductor was asked if the defendants had any rules, regulations, or conditions, as to the delivery of freight along the line of their road, and if they were posted up conspicuously

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in every place where freight was received and delivered. It was entirely immaterial whether they had or not, or whether the plaintiffs knew it or not. It is well settled that common carriers cannot limit their liability by any such means. They can do it only by a special contract, expressly entered into with the person whose goods are carried (*Dorr v. The New Jersey Steam Navigation Co.* 11 N. Y. 485; *Hollister v. Nowlan*, 19 Wend. 234).

The conductor was asked further, if there was any custom, or usage, requiring all claims for damages by reason of loss to be made within ten days after delivery at the station; and if the rules, regulations, and conditions of the defendants, conspicuously posted at the place for receiving and delivering freight, required such claims to be made within ten days after loss. Though the words, custom and usage, are here employed, it is evident, when the whole is taken together, that it was an offer to prove a usage or regulation of the defendants, and not a long established usage of that general nature, which would be binding upon all doing business with the road. As a regulation, it would be unreasonable, as more than ten days might elapse before a party knew of the loss of his property.

It is the duty of a common carrier to notify the consignee of the arrival of goods, and of their place of deposit; and, after they have reached the place of destination, to secure or store them safely, if the owner cannot be found (*Rowland v. M'In*, 2 Hilt. 150; *Fisk v. Newton*, 1 Denio, 45). This general obligation may be varied by an express contract between the parties; or a uniform and well known usage may be shown, establishing a mode of delivery in certain cases, or at particular places, in conformity with which the parties may be presumed to have contracted (*Gibson v. Culver*, 17 Wend. 305). But the offers made in this case were not of this nature.

The plaintiff Browning was competent to prove the value of the property lost. He was in the clothing business, and engaged largely in the manufacture of clothing. The articles lost were the materials for making up thirty-eight pairs of army pantaloons. He knew what the cloth and other materials cost,

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what it would have cost to make them up, and he knew the price the Government were to pay for them when manufactured. This was amply sufficient to entitle him to give testimony as to the value of the articles lost.

The judgment should be affirmed.

JOHN DUNN v. CHARLES DEVLIN.

In the absence of an affidavit accompanying an answer by an indorser of a promissory note, showing want of notice of presentment and nonpayment of the note, as provided by statute (Laws of 1833, chap. 271), the notarial certificate of presentment and nonpayment of the note is *prima facie* evidence of the truth of its contents:

Where it appears, by such certificate, that the notice of protest was given by depositing the same in the post-office, directed to the indorser at New York City (his residence), *Held*, that such presumption is not overcome by testimony of the notary, on the trial, that he might possibly have directed the notice to a particular street, in which defendant did not reside; and, therefore, it was not error to submit to the jury the question of the sufficiency of the notice.

APPEAL from a judgment entered upon the verdict of a jury.

The action was founded upon a promissory note, indorsed by the defendant, the defense being want of notice of presentment and nonpayment.

The notice of protest was sought to be proved by the notary's certificate, which certified that notice was given to "Charles Devlin, New York." The notary testified that he directed the notice to the defendant, at the corner of Second avenue and Fifty-second street, although he was not positive, and could not tell without looking at his books, which were not produced. The defendant really resided at the corner of Second avenue and Fifty-seventh street.

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The court left the question of notice to the jury, who rendered a verdict for the plaintiff.

The defendant appealed.

W. H. Ingersoll, for appellant.

I. The whole evidence shows, as a *fact*, that the defendant really had no notice whatever, of the non-payment or protest of the note, until more than one month after the nonpayment. And personal notice, by the holder, is a primary essential; any thing less is exceptional, and allowable only when personal notice is impracticable (1 Pars. on Contracts, 230; Story on Notes, 317; Pars. Merc. L. 115, 116; *Van Vechten v. Pruyn*, 9 How. 299; 13 N. Y. 549).

II. Any mere presumption cannot weigh against the absolute proof of a contrary fact, which effectually rebuts such presumption (1 Phil. Ev. 158; 3 Cow. & H. Notes, n. 298; Pars. Merc. L. 115). It is the very nature of a mere presumption to be susceptible of rebuttal; the maxim is: "*Stabit presumptioni, donec probetur in contrarium*," and especially as to official acts (*Brady v. Cubitt*, 1 Doug. 31; Broom's Max. 852; *Davenport v. Mason*, 15 Mass. 85; *St. Paul's, &c. v. Viscount Dudley*, 15 Vesey, 173; *Jones v. Morgan*, 1 Bro. C. C. 222; *Gardiner v. Astor*, 3 Johns. Ch. 53, 55). The notary himself, in his oral testimony, specifically rebuts and disproves the presumption established by his official certificate. Thus the presumption fails by the plaintiff's own evidence. All that remains is the mere fact, that a notice directed to the wrong place was deposited in the general post-office.

III. The mere fact of a lack of affidavit denying the receipt of notice of protest, as prescribed by the laws of 1833, ch. 271, § 8, is a matter of simple practice, and can be of no real effect here, as the proof of the plaintiff is substantially that the notice was not served according to law. Hence, any mere informality in the defendant's technical denial in the pleadings cannot be important. The plaintiffs remove the presumption themselves. There is no conflict of evidence; it is no evidence

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for the plaintiffs of service. The law presumes injury to the indorser (Pars. Merc. L. 117).

IV. The notice of protest was not served according to law. It was not directed correctly, so as to reach the indorser; and was directed incorrectly, so as to go astray. There is no proof that the notary ever looked in the directory for the residence. Inquiry is absolutely essential before the benefit of the statute of 1857 would apply (*Randall v. Smith*, 34 Barb. 452). When the parties reside in the same city, the holder is bound to give full and actual notice to the indorser (Parsons Merc. L. 107; *Cayuga Co. Bk. v. Bennett*, 5 How. 236; *Ransom v. Mack*, 2 Hill, 587).

John R. Flanagan, for the respondent.

I. The certificate of the notary was properly admitted in evidence, there being no affidavit with the answer of nonreceipt of notice of protest (2 R. S. [5th Ed.] 474, § 35; *Arnold v. Rock River Valley Union R. R. Co.* 5 Duer, 207; *Burrall v. DeGroot*, 5 Duer, 379; *Young v. Catlett*, 6 Duer, 437).

II. There was no error in submitting to the jury the question of the validity of the proof of service of notice of protest. The evidence on that subject was of such a character as to justify the submission of the question to the jury. The evidence of the defendant showing the nonreceipt of notice does not prove it was not served (*Arnold v. Rock River Valley Union R. R. Co.* 5 Duer, 207).

BY THE COURT.—BRADY, J.—The defendant Devlin was sued as the indorser of a note made by his codefendant, Smith. His answer denied that he was duly notified of presentation and nonpayment, but there was not annexed to it an affidavit containing such a denial of the receipt of notice, as is required by the statute of 1833, chap. 271, p. 395. The certificate of the notary was, therefore, presumptive evidence of the facts contained in it (*Arnold v. Rock River R. R. Co.* 5 Duer, 207;

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Young v. Catlett, 6 Duer, 437). The certificate averred that a notice of presentation and nonpayment was deposited in the post-office, in the city of New York, directed to "Charles Devlin, New York City," and the postage prepaid thereon. Devlin testified that he had not received such a notice, and the notary, on his examination on behalf of the plaintiff, said, in answer to the question, Did you serve a notice of protest? "Yes, through the post-office, directed, I think, to Charles Devlin, corner of Fifty-second street and the Second avenue; I would not be positive about that; I have not looked at my books." It appeared, also, that a memorandum on the notice stated the residence of the defendant Devlin, to be at the place mentioned by the notary, to which the notice was directed, but in whose handwriting the memorandum was made, or by whom, did not appear. The plaintiff testified that it was not in his handwriting, and that he did not know in whose it was. No evidence was given on behalf of the plaintiff, showing any effort to discover the defendant Devlin's place of residence (which was proved to have been on the corner of Fifty-seventh street and the Second avenue), by inquiries or otherwise, but it appeared from an examination of the City Directory, for the year 1863, that Devlin's name and residence were omitted therefrom. The presiding judge, on this evidence, submitted to the jury the question whether, under the circumstances, the notice was properly mailed to the defendant Devlin, and to such submission the counsel for defendant Devlin excepted. The exception was not well taken. The presumptive evidence created by the notarial certificate was not destroyed by the testimony of the defendant Devlin, that he did not receive the notice sent through the post-office. It may be, and must be assumed here to be, that he did not receive it, but that is not at all material. It is sufficient that the service was made in the manner directed by the statute (Laws of 1857-8, p. 839), the defendant Devlin being a resident of the city of New York. If the notary had stated without doubt, on his examination, that he had mailed the notice directed to the defendant Devlin, at the corner of Fifty-second street and the Second avenue, the question presented would be different, and the result, perhaps,

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more advantageous to the latter. We have held that a notice of protest, directed generally to the indorser, "New York City," when he resides there, is sufficient under the provisions of the statute referred to, but it may be that where the notary undertakes to give a more specific direction, some proof of diligence to ascertain the indorser's residence will be necessary to make the service good, if it be correctly addressed. It is not necessary, however, to decide that question in this case. The notary stated that he thought it was directed to the defendant Devlin, at Fifty-second street and the Second avenue, but would not be positive, not having looked at his books; but his certificate, which must be presumed to have been prepared with reference to the information before him, states the direction to have been New York City, and is entitled, therefore, to the paramount consideration. The notary was not certain, when giving his evidence, not having looked at his book, and the truthfulness of his certificate was not assailed. If the counsel for the defendant Devlin wished to remove the doubt, he should have called for the production of the books. He did not do so. The evidence in the case, for these reasons, established the fact, that the service of the notice of protest was sufficient, and the submission of the question to the jury on that subject was favorable to the defendant Devlin. If the plaintiff had excepted and the jury had found against him, there would have been more value in his objection. The exception considered is the only one properly made to the judge's charge, the counsel for the defendant Devlin having in all other respects, in a general way, excepted to it. That such an exception need not be considered is a familiar rule. Upon examining the charge, however, it appears that all the questions properly at issue, both by the defendant's answer and the material evidence, were submitted to the jury, and in as favorable a light for him as the evidence warranted. The whole case was therefore passed upon by the jury, and under instructions to which, save in one respect stated, no exception was taken.

The judgment must, for these reasons, be affirmed.

Aaron v. The Second Avenue Railroad Company.

EDWARD AARON, *by* LEVI AARON, *his guardian*, v. THE SECOND AVENUE RAILROAD COMPANY.

It is not negligence for a person to attempt to cross a street railroad track while a car is approaching at a high rate of speed, if there is in fact ample time to cross the track before the car, and the person could have done so but for an unavoidable accident.

Thus where the plaintiff, seeing a car approach, started to cross the street in front of it, but in ample time to have escaped it, but while crossing the track slipped and caught his foot in a hole in the pavement, and was run over by the car before he could escape—*Held*, that a motion for nonsuit, on the ground of the plaintiff's contributory negligence, was properly denied.

The bodily pain or suffering, which constitutes an element in estimating damages for bodily injuries, is not confined to that which may have been incurred before the trial, but includes such future suffering as it is reasonably certain from the evidence must result from the injury.

APPEAL by the defendant from a judgment at trial term. The cause was tried before Brady, J., and a jury.

The action was brought by the plaintiff, an infant, by his guardian, to recover damages for injuries sustained by being run over by the horse car of the defendant, in Pearl street, in May, 1861. It appeared in evidence that the plaintiff, a child between five and six years of age, was crossing Pearl street about five o'clock in the afternoon, in company with his sister, Mrs. Rauth. While still on the sidewalk, and before they began to cross the street, the car was "three houses distant from them," and was coming at a very high rate of speed. In crossing the track, the child's foot slipped on the rail, and caught in a hole two or three inches from, and outside of, the rail. Before the child's foot could be extracted from the hole, or the moment it was extracted, the horses of the car were upon him, and his leg was so injured as to require amputation.

It was testified to that, if the child had not fallen, there would have been ample time for him to have crossed before the car could have reached them.

There was also some evidence that the brake of the car was out of order, and could not be worked effectually.

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The plaintiff's counsel put to the physician who had attended the plaintiff, the questions, "What will be the natural consequences of the injury? Will not the result be permanent, or to a considerable extent permanent, as regards time?" Objection was made, and the objection overruled.

At the conclusion of plaintiff's case, and also when the whole case was closed, the defendant's counsel moved to dismiss the complaint, which motion was denied, and the case submitted to the jury, the judge charging, at the request of the defendant's counsel, "that no damages can be laid in respect to the future, except for the necessary consequences of the injury."

The jury rendered a verdict for plaintiff for six thousand five hundred dollars.

John H. Platt and John Slosson, for appellant.

Christopher Fine and John Graham, for respondent.

BY THE COURT.—DALY, J.—The motion for a nonsuit was properly denied. It appeared, from the evidence, that Mrs. Rauth attempted to cross the street, having her young brother, the plaintiff, a child of six years of age, by the hand. That, as she undertook to cross, she saw the car approaching, and there was, as she expressed it, plenty of time to have crossed, but that her brother's foot caught in a hole, two or three inches from the railroad track, which made it necessary for her to stoop down to disengage the child's foot, which, as she described it, was stuck in between the stones, in a hole, so that she had some trouble to get it out. That, just as she had loosened the foot, she heard the noise of the car close to her, and was about to run back with her brother, but the horses were so near that they knocked the child down, and the wheels of the car passed over him, injuring one of his legs so badly that it had to be amputated. This state of facts showed that there was no negligence on the part of Mrs. Rauth, or on the part of the child, as there was ample time to have crossed when she left the sidewalk, and the child's foot caught, not, as may be inferred, through any negligence, but accidentally.

There was negligence, however, on the part of the driver of

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the car. Several witnesses testified that the car was going very fast—much faster than was usual—and, according to the testimony of the policeman, at a rate between eight and ten miles an hour; the lawful rate of speed being limited, by the city ordinance, to five miles an hour (Revised Ordinances of City of New York, 1859, p. 315). It was also in evidence, that, even at the rate he was going, there was time enough for the driver to have stopped, if the car had not been out of order. The policeman testified that the driver had time enough, and distance enough, to have stopped; that he had full time to have stopped, if the car had not been out of order; that he, the policeman, was told that the car was out of order, and that the defendants intended to lock it up that trip. This was not a case, therefore, of mutual or co-operating negligence, but one in which the accident was caused either by the heedlessness of the driver, or in consequence of the rapid rate at which he was driving, or by reason of the defective condition of the car, either of which causes would present a case of negligence on the part of the defendants, or of their agents.

None of the exceptions were well taken. The bodily pain, or suffering, which constitutes an element in estimating the damages in such a case, is not confined to that which may have been incurred before the trial, but includes such future suffering as it is reasonably certain, from the evidence, must result from the injury (*Curtis v. The Rochester and Syracuse Railroad Company*, 18 N. Y. 534). The physician was of opinion that the child might be liable thereafter to suffer pain, which was corroborated by the statement of the mother, that the boy suffers great pain upon a change of weather; that in the winter, or when there is a change in the weather, he cannot go to school, and that every time the weather changes he suffers pain.

The damages were not excessive. The plaintiff was maimed for life, deprived of the use of his leg, had undergone great pain and suffering, and, besides having his powers of locomotion impaired, was liable in the future, from the serious character of the injury, to further pain and suffering. Under these circumstances, the verdict was a reasonable one, and the judgment should be affirmed.

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FRANCIS X. HAZMAN v. THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

It is negligence in a ferry proprietor not to provide a ferry bridge which can be raised and lowered with the tide, so as to be brought to a level with the boat while discharging its passengers; and it is negligence in a ferry proprietor to to order vehicles to be driven off the boat while it is at an unsafe distance above or below the level of the bridge.

Some time after the defendants' ferry boat arrived at the ferry house, and was fastened to the bridge, and while the arriving passengers were coming off the boat, the plaintiff, in making his way to the cabin of the boat, became wedged in the press of the on and off-going passengers, near the string piece which separated the passenger way from the carriage way of the boat. While in this position, he placed one foot over the string piece into the carriage way, and at that moment defendants' servant lowered the chain in front of the carriage way, and ordered the carts, &c., to be driven off. The bridge being eight or nine inches higher than the boat, one of the horses, in attempting to mount the step thus formed, fell upon the plaintiff, and crushed his leg. *Held*, that there was sufficient proof of negligence on the part of the defendants to go to the jury, and it was error not to submit the question of defendants' negligence to the jury.

Where the plaintiff, a passenger on the defendants' ferry boat, was crowded out of the passenger way into the carriage way of the boat, and it appears that the crowding and pushing of the passengers could have been prevented by the erection of a permanent division on the ferry bridge, restraining passengers from going to the boat until it was discharged of its arriving passengers, and by the erection of an effective barrier between the carriage way and passenger way of the boat, the court will not say, as matter of law, that it was negligence on the part of the plaintiff to be in the carriage way when injured.

APPEAL by the plaintiff from a judgment entered on a dismissal of the complaint at trial term.

This action was brought to recover of the defendants, as common carriers of passengers by steam ferry boats between New York and Hoboken, the damages alleged to have been sustained by plaintiff in consequence of an injury to his leg, occasioned by the falling of a horse upon it, on board of one of the defendants' ferry boats. The complaint alleges that the defendants carelessly and negligently caused the horse to be driven against the plaintiff; omitted to give any notice of its approach; omitted to land the horses and carts before admit-

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ting plaintiff on the boat; omitted to prevent the overcrowding of the boat, pier, and bridge; omitted to provide proper safeguards against the horse; omitted to provide any place of retreat for said plaintiff from the horse; and omitted to take any precaution necessary for the safety of the plaintiff.

The answer admits that an injury was sustained by the plaintiff from an accidental collision with a horse driven by persons unknown, but denies every allegation whereby negligence or carelessness is imputed to the defendants, and avers that the injury was occasioned by the plaintiff's own negligence, in negligently and carelessly exposing himself upon that part of the boat appropriated to the use of horses and vehicles.

On the trial, the plaintiff having rested his case, defendants' counsel moved to dismiss the complaint, on the ground that the evidence was insufficient to show that plaintiff's injuries were occasioned by the negligence of the defendants, and on the ground that the plaintiff had contributed, by his negligence, to produce the accident. The court granted the motion solely on the latter ground. The plaintiff then appealed to the general term.

Charles Wehle and Thos. Darlington, for appellant.

L. B. Woodruff and C. F. Sanford, for respondents.

BY THE COURT.—DALY, F. J.—This is a close case, but I think there was enough in the evidence to entitle the plaintiff to go to the jury. The plaintiff testified that he was pushed down, with the rest of the passengers, to the end of the bridge, to the boat; that the people were crowding on and off the boat, because it stops only a few minutes after its arrival; and that he stepped on the boat, because he was pushed by the crowd that followed him. The part of the boat nearest the bridge is an open space, divided by a string piece, five inches high, upon which there are posts, with no chains between separating the passenger way from the carriage way. There is a large chain across the carriage way, and a small one across the passage way. As the plaintiff stepped upon the boat, the chain across the passage way was down, and an employee on

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the boat, who had charge of the chain across the carriage way, threw it from the south side of the boat, where he was standing, to a post on the passage way, and called to the cartmen, "drive out." As the plaintiff came upon the boat, he was pushed back toward the left by ladies coming out of the cabin, and could not advance. He stepped upon the string piece, and took hold of the first of the posts, but he said that the people were crowding him down, and that he had to step from the string piece with his left foot. At or about that moment, or as soon as the boat touched the bridge, and the defendants' employee called to the drivers of the vehicles to drive out, a wagon came along. The bridge, which was a chain, and not a floating bridge, was not upon a level with the boat, but was about eight or nine inches higher; and as the wagon came along, the horse struck against the bridge, and could not get on it, as the boat was lower. As the witness Evarts described it, the horse rushed against the bridge. The boat, she says, was wet, which made the horse slip; and, as she further describes it, the animal first stepped forward to the bridge, and then fell down. And another witness says, that his attention being attracted by a considerable noise, he turned around, and saw a horse jump up; and another saw it stumble and fall down. At this instant the plaintiff was seen by witnesses, who say that he could not move either to the right or to the left; that his left foot was on one side of the string piece, and his right foot upon the other, without its being in his power to move either way. The axle of the cart came against him, the horse fell upon him, crushing his foot, and he fell backward across the string piece, when he was taken up by some gentlemen, with his foot hanging loosely from his leg. It further appeared that there had been a great increase of business at this ferry, in consequence of its having been made the terminus of the Morris and Essex Railroad about six months before the happening of the accident; an increase, according to the statement of one of the witnesses, beyond the greatest capacity of the defendants to accommodate. It also appeared that the defendants, after the accident, made an important arrangement for the security of passengers. This change consisted in putting up a fence

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along the bridge, separating the passengers going to the boat from those coming from it; by means of which fence or inclosure those going to the boat are compelled to wait on the bridge, or in the waiting room, until the passengers and vehicles have left the boat, when the gate is opened, and those in the inclosure go on board. This alteration, says the witness Wehle, was evidently made in order to prevent such accidents. Before it was made, there were no barriers, so that the passengers going to the boat came in contact with those coming from it, and were frequently in jeopardy of their lives. Those going to it always went on the lower end of the bridge, which prevented the speedy discharge of passengers and vehicles from the boat, and caused crowding and confusion. I think it is fairly inferable, from the evidence, that the direct cause of the accident was the fact, that when the order was given to drive out, the boat was not up to the level of the bridge, which caused the horse, as he advanced, to stumble and fall. Being a chain bridge, I suppose it could be raised or lowered, to bring it, with the rising or falling of the tide, to the level of the boat. If it could, it was an act of negligence on the part of the defendants' servant to order the vehicles to be driven out, while the boat was eight or nine inches below the level of the bridge; or, if the bridge was immovable, so that it could not be uniformly brought to the level of the boat, it was an act of negligence on the part of the defendants to have such a structure. The subsequent changes which were made show, also, that at a ferry, so crowded with business as this, proper precautions had not been taken for the safety and security of passengers; and that, if the arrangement which the defendants afterward made, had existed at this time, a serious accident like this would not have occurred. That there was negligence on their part is, I think, very clear; and it only remains to consider whether there was mutual, or that co-operating negligence on the part of the plaintiff, which contributed to, and without which the accident could not have happened. It would be assuming too much to say that he was guilty of negligence by the mere act of going upon the bridge; and all that occurred afterward, so far as he was concerned, was involuntary. He

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swears expressly that he was pushed down to the end of the bridge, and upon the boat; and it was proved by other witnesses that he could not advance upon the boat, but was pushed back, and forced into the position in which he stood, unable to move to the right or to the left, when the horse, retreating from the bridge, stumbled and fell upon him. It was in evidence, that a great many persons were rushing on to the boat, and off it; and that the plaintiff was impelled or pushed forward by one class of passengers, and checked as he advanced by another, until he was so wedged in as to be unable to move. It was not by his own act, therefore, but by the act of others that he was placed in this position, and that such a state of things should have occurred, was attributable to the defendants' neglect to adopt some such arrangement for the ingress and egress of passengers as the one to which they afterward resorted, and which, it is evident, is effectual to prevent the recurrence of such scenes. For these reasons, I think there was sufficient in the case to go to the jury (*Bernhardt v. Rensselaer and Saratoga Railroad Co.* 32 Barb. 168, 169; *Smith v. New York and Harlem Railroad Co.* 19 N. Y. 127, 133; *Edgerton v. The Same*, 35 Barb. 193, 198; *Brown v. New York Central Railroad Co.* 31 Barb. 385; *Caldwell v. Murphy*, 1 Duer, 241; *Alden v. New York Central Railroad Co.* 26 N. Y. 102; *Buel v. The Same*, 31 N. Y. 319).

CARDOZO, J., concurred.

BRADY, J.—Although I still adhere to the opinion that this is a case of concurring negligence, in deference to the opinion of my brethren, I concur with them in ordering a new trial.

Judgment reversed, and new trial ordered.

Vanderpoel v. Smith.

JACOB VANDERPOEL v. THOMAS B. SMITH *and others.*

A covenant in a lease provided that, if the building demised should "be destroyed and burned down," and the plaintiff should not rebuild within a reasonable time, the defendants should have the right to terminate the lease. *Held*, that a partial injury of the buildings by fire, so that they could be repaired without rebuilding the structure, was not such a destruction and burning down as was contemplated by the covenant.

APPEAL by the defendants from a judgment of the Marine Court at general term.

The plaintiff leased to defendants for the term of ten years and two months, from March 1, 1859, the premises No. 205 East Twenty-fifth street. The premises were injured by fire. There was a clause in the lease, that in case the building should "be destroyed and burned down," and the plaintiff should not rebuild within a reasonable time, the defendants had the right to terminate the lease. The defendants vacated the premises, contending that there was such a destruction and burning down of the buildings that they had a right to terminate the lease. The action was brought to recover the rent accruing after such vacation of the premises.

G. R. & T. D. Pelton, for appellants.

A. J. Vanderpoel, for respondent.

BY THE COURT.—DALY, F. J.—The covenant in the lease, was, that if the buildings should be *destroyed and burned down*, and the plaintiff should not, within a reasonable time, *rebuild* the buildings, the defendants should have the right to terminate the lease.

What is expressed by these words, is not merely the injury of the buildings by fire, but such a burning down and destruction of them, as would make it necessary substantially to rebuild them. If the injury were but partial, so that they could be repaired without rebuilding the structure, it was not such a destruction and burning down as was contemplated by this covenant (*Wall v. Hinds*, 4 Gray, 256). This the court below

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found to be the fact, and it was justified by the evidence in so finding.

There were two buildings of brick. The one upon the front of the lot was three stories high, and that upon the rear was one story. In the rear, were two large chimneys forty feet high, with a face or front of about twenty-four feet, which chimneys, it would seem, were used for the manufacture of varnish. There were no partitions in the rear buildings, nothing but floors and windows, and it was built up to the front building.

One of the witnesses for the defendants testified that the plaintiff put down the buildings, in his annual stock account, including the chimneys, at \$1,800, and another of the plaintiff's witnesses, a sash and blind maker, testified that the buildings could have been built for \$1,000, while a builder of forty years' standing, examined on the part of the plaintiff, gave it as his judgment, that the buildings were worth \$2,000, and the chimneys \$1,000.

A fire broke out in the rear building, in the month of August, 1861. A detail of the injury caused by it was given by the various witnesses, and they did not materially differ in their description. The point in which they were in conflict, was whether the buildings could be repaired without rebuilding. Two builders were examined by the defendants, but they gave no testimony upon this point; but the sash and blind maker, before referred to, testified that he had been accustomed to examine buildings, and that, in his opinion, the proper way to restore the buildings to the condition they were in before the fire, would have been to have taken down what was left standing, and rebuild from the foundation.

The builder, before referred to, examined on the part of the plaintiff, saw the premises three days after the fire, and offered to put them in the same condition as before the fire, for \$400. A year and a half afterward, he repaired them, for which he received \$650, but in the meanwhile, he said, the rear part and the gable wall had all fallen down, and 8,000 brick and the iron door had been taken away, the sashes had all been broken, and the casings had been smashed. He did not, he says, put them in the same condition as before the fire, but

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nearly as good. His statement of the augmentation of injury after the fire was corroborated by several witnesses. Adams, the deputy superintendent of buildings, saw them nearly a year and a half after the fire, and found them in a much worse condition than at the time of the fire. He noticed that timber had disappeared, and that boys and others had free access, and were pulling and hauling at them, and that there was a hole in the wall, that he was sure the wind had not made. Another witness, Taylor, connected with the superintendent's department, who had examined the buildings after the fire, found upon his next visit, that the rear walls were pretty well down and much injured, and he saw a lot of boys throwing bricks at timbers, trying to get them down, and the superintendent of public buildings thought that the buildings had been more damaged since, than at the fire, by being pulled down.

Mr. Gregor, the superintendent of public buildings, and Adams, his deputy, were at the fire. Adams examined the buildings, in accordance with his duty, and found the rear building damaged about one-quarter, and that the damages to the front buildings were between two and three hundred dollars. The superintendent testified that the front building was injured about one-third, and that the buildings could have been repaired very easily. This is corroborated by Taylor, who says that the front building was injured one-third, and that the rear building required only little repairs; and the surveyor of the Merchants' Insurance Company, who was a builder, examined the premises ten days after the fire to see in what way they were injured, and formed an estimate of the extent of it, which he said was about \$400.

This testimony, on the part of the plaintiff, was of a character that entirely warranted the finding of the judge at the trial. It showed, very conclusively, that the buildings could have been repaired after the fire at an expense of about one-fifth of their value, even adopting the low valuation given in evidence by the defendants' witness; that they were not burned down and destroyed within the sense of the words of the covenant, and could have been restored to their former state by a moderate outlay, without the necessity of rebuilding. The judgment should be affirmed.

Pearl v. Robitchek.

ADOLPH PEARL v. ROBITCHEK & TAUSSING.

A judgment debtor, who, in good faith and with no intention to defraud the plaintiff's attorney of his costs, settles the judgment, is entitled to have the judgment satisfied of record, notwithstanding the judgment creditor may not have paid his attorney's costs.

APPEAL from an order at special term. In August, 1865, plaintiff obtained a judgment against the defendants for \$500 damages, and \$88.87 costs. The defendants paid the plaintiff \$175, on the express understanding and agreement between them, that the plaintiff was to pay out of said sum his own attorney's costs, and satisfy the judgment. It did not appear that plaintiff's attorney had notified defendants, of the non-payment of his costs, nor that there was a collusion between the plaintiff and defendants to cheat the attorney of his costs.

The defendants moved for an order that the judgment be satisfied of record, which was granted by the court on the authority of *Ackerman v. Ackerman*, (14 Abbott Pr. R. 229).

The plaintiff appealed from the order.

F. C. Cantine, for appellant.

I. The only question considered by the court, at special term, was, whether the attorney's lien for his costs and disbursements had survived the settlement between the plaintiff and defendants. *Ackerman v. Ackerman* (14 Abbott, 229), was a motion to set aside an execution issued by the attorney to collect his *counsel fees*, after he had received from his client the *costs and disbursements* in the action, and the judgment had been satisfied of record. It was held, at general term, that the execution was not regularly issued, as the judgment was satisfied of record; that the *costs* having been paid, the attorney could have no lien upon the judgment for *counsel fees*, until the amount of such fees were definitely ascertained. The question, therefore, whether notice was essential to the creation of a lien

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in favor of the attorney for the *costs* and disbursements in the action, was not involved in the case.

II. The attorney's lien upon the judgment extends to a sum equivalent to the amount of the costs and disbursements in the action, and is perfect without any notice to the judgment debtor, beyond that furnished by the record (*Haight v. Holcomb*, 16 Howard Pr. 173; *McGregor v. Comstock*, 28 N. Y. R. 238. See, also, *Hall v. Ayer*, 9 Abbott, 220; *Keenan v. Dorflinger*, 19 Howard, 153; *Shackleton v. Hart*, 20 Id. 39; *Fox v. Fox*, 24 Id. 409; *Richardson v. Brooklyn City &c. R. R. Co.* 24 How. 321; *Rooney v. Second Ave. R. R. Co.* 18 N. Y. R. 368; *Ward v. Wordsworth & Lyme*, 1 E. D. Smith, 598, and 9 Howard, 16).

III. Imposing upon attorneys the necessity of giving notice in order to secure a lien for their costs, would occasion them great inconvenience, and destroy all friendly and confidential intercourse between them and their clients. Whatever inconvenience may arise in the settlement of judgments should be put upon the judgment debtor.

Charles Wehle, for respondents.

BY THE COURT—DALY, F. J.—The question raised in this case was considered and passed upon in *Ackerman v. Ackerman*, (14 Abb. 229), and, although the point was not essential to the decision of that case, it was not a new one. It was expressly held by Lord Mansfield, in *Welsh v. Hole* (1 Doug. 238), that a defendant may pay the whole debt and cost to the plaintiff, without the privity of his attorney, where there has been no notice from the attorney not to do so, express or implied. That was a case in which the payment was made, as in this case, after a judgment was entered up for the damages and costs, and the rule for the defendant to show cause, why he should not pay to the plaintiff's attorney his bill of costs, was discharged. It was also held in *Chapman v. Haw* (1 Taunt. 341), that, where there was no fraudulent conspiracy to cheat the attorney, the plaintiff had a right to settle the suit with the defendant, without consulting his attorney, and take upon him-

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self the payment of the costs of his attorney; and the attorney, after being notified of the settlement of the suit by the plaintiff, having issued an execution, the court set the execution aside. It has frequently been decided by this court—and, before the Code, was always understood to be the law in this State—that a defendant might settle with the plaintiff, either before or after judgment, without the intervention of the plaintiff's attorney, unless he had information of the attorney's lien, or was notified by the attorney not to pay unless his claim for his costs was satisfied (*Graham's Practice*, 61, 2d ed.; *Ten Broeck v. De Witt*, 10 Wend. 617; *St. John v. Diefendorf*, 12 Id. 261), and there is nothing in the Code to change the law in this respect. Where it is apparent that the suit has been collusively settled, with the manifest design, both on the part of the plaintiff and the defendant, to evade or get rid of the attorney's costs, the court will interfere to prevent the defendant from getting rid of the judgment (*Mitchell v. Oldfield*, 4 T. R. 123, 124). Such may have been the intention of the plaintiff in this case, but there is not enough to warrant the legal conclusion that that was also the intent of the defendants, or which would entitle us to say that the settlement, on his part, was not made in good faith. The order appealed from should therefore be affirmed.

LOUIS EAGLE v. CAROLINE SWAYZE.

A landlord who negligently suffers a chimney upon the demised premises, to remain in such a ruinous condition, that, by its fall, it causes injury to his tenant's property, is liable in damages.

An action for damages for negligence in the management of her separate estate, may be maintained against a married woman, without joining her husband.

There being no issue as to title to land under the pleadings, and the only evidence on the trial, as to title, being an admission of ownership by the defendant :
Held, that no question of title was raised.

APPEAL by the defendant from a judgment of the Third District Court.

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The action was brought to recover damages sustained by the plaintiff by reason of the defendant's negligence in the management of her property. The answer alleged that the defendant was a married woman, and set up a general denial. It appeared on the trial that the plaintiff had occupied the basement of No. 148 Varick street, for years, as the tenant of the defendant; that defendant had admitted to him that she was the owner of the premises, and that her husband had nothing to do with it, that the chimney was out of repair, and that he had called the defendant's attention to its ruinous condition, and she had promised to have it repaired. Some time afterward the chimney fell down and injured the plaintiff's stove and furniture, for which injuries he brought the action. Judgment was rendered for the plaintiff, and the defendant appealed therefrom.

M. V. B. Wilcoxon, for appellant, on the question of the personal liability of a married woman for negligence, cited *Chapman v. Leman*, (11 How. Pr. 235); *Potter v. Deyo*, (19 Wend. 364); *Tift v. Tift*, (4 Den. 178); *Sheldon v. Quinlan*, (5 Hill, 441); 2 Kent's Comm. 168.

BY THE COURT.—DALY, F. J.—A tenant from year to year, renting part of a dwelling house, the residue of which is occupied by other tenants, is under no obligation to make repairs of so general, substantial, and lasting a nature, as the rebuilding of a chimney which has fallen down (*Johnson v. Dixon*, 1 Daly, 178; *Horsefall v. Mather*, Holt's N. P. C. 7; *Godfrey v. Watson*, 3 Atk. 517, 518; *Taylor's Landlord & Tenant*, § 343, 5th ed). In the absence of an express agreement on the part of the tenant to do so, it is the duty of the landlord to repair an injury to the building of this description, and if he negligently suffers one of the chimneys to remain in so defective a state that it tumbles down, causing loss and injury to the tenant, he is answerable to the tenant for the consequences.

There is nothing in the objection that the defendant's husband should have been joined with her as a codefendant. Though the action sounded in tort, the cause of action was the

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defendant's want of care and neglect in the management of her separate property. It was, therefore, a matter having relation to her separate property, and where such is the case, a married woman may now, by statute, be sued in the same manner as if she were a *feme sole* (Laws of New York, 1860, p. 158, § 7).

There was no evidence in the case, showing that the plaintiff was guilty of any negligence, which co-operated in producing the injury to his property, caused by the fall of the chimney.

No question of title arose upon the pleadings; and simply proving, at the trial, that the defendant had admitted that she was the owner of the property, and that her husband had nothing to do with it, which ownership she did not upon the trial dispute, raised no question as to the title (*Loughurst v. The New York & New Haven Railroad Co.* N. Y. Com. Pls. G. T. 1853).

No objection was taken upon the trial to the competency of the witnesses to testify in respect to the value of the property, or the extent of the damages done to it, and such an objection is not available now. The judgment should be affirmed.

ANDREAS STAUFF v. MICHAEL MAHER.

In an action to recover possession of personal property, in the District and Marine Courts of New York City, judgment for the plaintiff cannot be rendered in the manner prescribed by section 277 of the Code of Procedure; but should be in the alternative for a return of the property, or for its value, if a return cannot be had as prescribed by the Revised Statutes (2 Rev. Stat. 530, §§ 49, 50).

The common law action of replevin, and its modifications by the Revised Statutes and the Code of Procedure, considered.

APPEAL by the defendant from a judgment of the Fourth District Court. The action was brought to recover possession of personal property, under section 206 of the Code of

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Procedure. The complaint demanded judgment, "that the defendant be adjudged to deliver to plaintiff the said property, and to pay him \$50 damages for the detention thereof." The summons was for the relief demanded in the complaint, and for judgment "for \$250 for keeping and detaining personal property."

It appeared on the trial that the defendant had refused to deliver the property to the marshal, who was required, by the indorsement upon the usual affidavit, as provided by the Code, to take immediate possession; and, on proof of the plaintiff's ownership, and the value of the goods, the justice gave judgment absolute in favor of the plaintiff for \$250, as provided by section 277 of the Code of Procedure. The defendant appealed, on the ground that the operation of section 277 of the Code, prescribing the form of judgment in actions for claim and delivery, was not extended by the Laws of 1862 to the Marine and District Courts.

Thomas H. Hurley, for appellant.

William H. Van Cott, for respondent.

BY THE COURT.—DALY, F. J.—By the act of April 24, 1862, § 17, (Laws of 1862, p. 975), the provisions of the Code, from section 206 to 217, inclusive, are applied to the Marine and District Courts. These provisions in the Code were designed to be a substitute for the former action of replevin, but not wholly so, for they do not constitute a complete system; and as it was manifestly not the intention of the legislature to lessen the remedy afforded by that action, the law, as it existed before, is in force, and may be resorted to in contingencies for which the Code has made no provision (*Roberts v. Randall*, 5 How. 327; *Chappell v. Skinner*, 6 How. 339; *Wilson v. Wheeler*, Id. 49; *Brockway v. Burnap*, 16 Barb. 314; *Rockwell v. Saunders*, 19 Id. 481). The sections of the Code which have been applied to the Marine and District Courts, make no provision as to the manner in which judgment is to be given. That is pointed out by the 277th section, and as that section is

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not applied to these courts, the construction must be, that it is to be entered up in the mode which existed in this State before these sections of the Code, in the Statute of 1862, were enacted.

The summons in this case was for the relief demanded in the complaint, and stated that the plaintiff would take judgment against the defendant for \$250, for keeping and detaining personal property. The complaint was for the wrongful detention of the property claimed; and the relief asked for was that the defendant might be adjudged to deliver it to the plaintiff, with damages for the detention of it to the sum of \$50, and that it might be forthwith delivered to the plaintiff. It further appears that the plaintiff made the affidavit required by the Code, where the immediate delivery of the property to the plaintiff is demanded; and the marshal was required, by an indorsement upon the affidavit, to take the property from the defendant, and deliver it to the plaintiff. Whether the undertaking required by the Code for the due prosecution of the action, and for the return of the property, if adjudged, was executed and approved, does not appear. The summons was served by a marshal, who was accompanied by the plaintiff. He read to the defendant a description of the property, and the defendant said he had it. The marshal then demanded it, and the defendant answered, "Find it out, and you can take it." The marshal then requested the defendant to point it out, which he refused to do. The marshal testified that he saw the property, but it does not appear that any thing further was done by him respecting it, or that he made any return, except as to the service of the summons. The defendant appeared upon the return of the summons, put in an answer; and the plaintiff having shown upon the trial, to the satisfaction of the justice, that he was the owner of the property, and that the value of it was \$250, the justice rendered judgment in favor of the plaintiff for that amount.

Upon a case like this, no such judgment could be rendered. If the 277th section of the Code had been applied to the justice's court, it would not have authorized such a judgment; but the judgment then would have had to be in the alternative; that

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the plaintiff recover the possession of the property or the value of it, as ascertained upon the trial, in case a delivery of it could not be had (*Rockwell v. Saunders*, 19 Barb. 479; *Dwight v. Enos*, 5 Seld. 475; *Fitzhugh v. Wiman*, Id. 559-562), and this was substantially the judgment to be rendered in such a case under the Revised Statutes, which provided, that if the property specified in the declaration, should not have been replevied and delivered to the plaintiff, the judgment should be that it be replevied and delivered to him without delay, or, in default thereof, that he recover from the defendant the value of the property as it was assessed by the jury upon the trial, and that the execution should command the sheriff to replevy the property and deliver it to the plaintiff, if it could be found in his county, and if not, that he levy the value of it, together with the damage and costs, of the goods, chattels, lands, and tenements of the defendant (2 Rev. Stat. 530, §§ 49, 50).

It is suggested, that as § 277 of the Code was meant to be a substitute for the pre-existing provision in the Revised Statutes (*Fitzhugh v. Wiman*, 5 Seld. 564), and as it has not, probably through inadvertence, been applied to the Marine and Justice's courts, that the proper course is to enter up a judgment, according to the common law, for the value of the property, with damages for the detention and cost, and in that view, that the judgment below was correct.

The manner in which judgment was given in the action of replevin at common law, is wholly inapplicable, and the course to be pursued, as before stated, is to enter up the judgment in these courts in the mode in which it was entered in the action of replevin in this State, when the Code was enacted. Replevin at the common law, was a remedy by which the possessor of property wrongfully taken upon a distress, might have it restored to him, and though not in strictness limited to a wrongful taking upon a distress, it was rarely resorted to except in such cases.* The property was taken by the sheriff upon a

* It was the most complicated of all the common law actions. There were so many courses of procedure, and so many forms and distinctions, that it is very difficult at the present day, even with all the aid that the early reports and

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writ *replegiare de overiis*, issuing out of the court of chancery, and was delivered to the plaintiff, he giving pledges that he would try the right with the distrainor, which was determined before the sheriff, in the county court, unless the matter was removed to a higher tribunal, and if it was found that the distress was wrongful, the judgment was that the plaintiff should retain possession of the goods, and recover damages for the wrongful caption and detention of them. If the sheriff, after the issuing of an *alias* and a *pluries* writ, returned that the property was eloigned by the defendant out of the sheriff's bailiwick, or to places unknown, or that he himself could not obtain view of it, so as to make delivery; then the plaintiff had his *writ of withernam*, by which cattle or goods, equal in value to those distrained, were taken from the defendant and retained by the sheriff until the defendant delivered the property taken upon the distress, and if after the issuing of a *pluries in withernam*, the sheriff returned that he could find no property, the plaintiff had then an *exigent*, to which the defendant was required to appear, upon pain of outlawry, and, upon appearing, he was fined, and if he paid the fine, and would gage deliverance, that is, put in pledges that he would deliver the property, then the plaintiff declared, and upon the joining of issue, a writ went to the sheriff for the delivery of the property to the plaintiff, and if he recovered in the action, he had, in addition, damages for the wrongful caption and detention of it, and for his costs; and if the defendant would not gage deliverance, he was committed to prison (Fitz N. B. 68, 69, 73; Coke Lit. 145, b; 2 Inst. 140, 141; Bro. Abr. replevin, 36, 39; Roll. Abr. replevin, B.; Shep. Abr. replevin, Part II. 251; Com. Dig. replevin, A.; Bac. Abr. replevin, A. E.; and 2 Reeves' History of the English Law, p. 46-48, 69, 112, 117; Crabbe's English Law, p. 292.

If, before the writ of *withernam* was issued, the defendant appeared upon the return of the *pluries*, the plaintiff might aver that the defendant was still possessed of the goods, and

treatises can furnish, to ascertain the practice which prevailed, with entire exactness.

pray that he gage deliverance, and, if the defendant would not, he was committed (Brownlow, 1, 169); or, where the return was, that the goods were eloigned, the defendant might appear and plead that he did not distrain them, or that the cattle were dead, in which case the writ of *withernam* was stayed; or, if the defendant claimed property in the goods, then the plaintiff was put to his writ *de proprietate probanda*, when all proceedings were stayed until that point was determined by an inquest of office, which, if found for the defendant, there was an end of the replevin, and, if found for the plaintiff, the sheriff delivered the property to him (Coke Litt. 145; 2 Inst. 193; Com. Dig. Pleader, 3 K. 10; Finch L. 450; Dalton's Sheriff, 69, 84; Wilkinson on Replevin, 17).

This was the nature of the action of replevin at the common law, in which the utmost power of the law was put in requisition to secure the property wrongfully taken, and deliver it into the possession of the plaintiff, and, if it failed, all that was obtained was the outlawry of the defendant, by which all his goods and effects might be seized and sold, the proceeds forfeited to the crown, and his person imprisoned until the outlawry was reversed or he was pardoned.

There were two forms of the action. If the property were replevied, it was in the *detinuit*; if not, it was in the *detinet*. If the property was not replevied, but the defendant appeared at the return of the summons, the plaintiff might declare, in the *detinet*, that the defendant "still hath and detaineth the cattle," but, by so doing, he waived his right to the recovery of the actual property, and took judgment for its value, with damages for the wrongful taking and detention of it, for, in this form of the action, there could be no recovery of the property, but only its value (*Pettee v. Duke*, Lutw. 1150; 1 Saund. 347, a. b. (2); Com. Dig. Pleader, 3 K. 10; Dal. Sh'ff. 84; Fitz N. B. 69, L.; Chitty Pl. 186). But replevin in the *detinet*, as well as the common law mode of commencing the action by a writ out of the court of chancery, have long been obsolete (1 Saund. 347, b. 2; Bull N. P. 52; 1 Chitty Pl. 186; Wilkinson on Replevin, 7; Dunlap's N. Y. Practice, 875). Replevin in the *detinet* has been superseded by less dilatory and more efficient remedies, such as *detinue*, in which, if the property was severally dis-

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tinguishable, the plaintiff could recover it or its value; or *trover*, in which, if it were wrongfully detained, he recovered for its value; or trespass, which would seem to have been the appropriate remedy (2 Inst. 141), in which the sum recovered included its value, with damages, for the taking and detention. The form of proceeding by writ was supplanted by the Statutes of Marlbridge (52 Hen. III. c. 21), and of Westminster (13 Edwd. I. c. 2), under which a plaint might be levied before the sheriff, and he, after taking pledges to prosecute, and for the return of the property, if adjudged, filed the plaint in the county court, and granted a precept to one of his deputies, directing him to replevy the property, to restore it to the plaintiff, and to summon the defendant to appear and answer at the next county court; and various other statutes were passed, chiefly in relation to the action, as a remedy for a wrongful distress. The modern action of replevin is in the *detinuit*, which, as the word denotes, implies that the property has been already delivered to the plaintiff (*Pettee v. Duke*, Lutw. 1151; 1 Saund. 347, b.; Browne on Actions, 447; Bac. Abr. replevin and avowry, L.; *Bruce v. Learned*, 4 Mass. 614), and in it there can be no recovery for the value (1 Chitty Pl. 187; Fitz N. B. 69, L.); but the form of the judgment is simply that the plaintiff recover his damages for the taking and detaining of the property (Bingham on Judgments, 363). If the property, therefore, was not taken upon the writ, replevin in the *detinuit*, as a remedy, was fruitless (*Roberts v. Randel*, 3 Sandf. S. C. 714; *Pettee v. Duke*, 1 Saund. 347, b.) It is said, in Tidd's Practice, 887, that if the goods are not delivered to the plaintiff, on replevying them, damages are given as well for the value of the goods as for their detention, but the authorities to which he refers were cases of replevin in the *detinet*, which, as I have already stated, has long been obsolete; and Wilkinson, in his work on the practice in replevin, page 30, says, that if the goods are withheld, the plaintiff may proceed in the action and recover damages to the full amount of the goods, as well as for the detention, but he cites no authority, and none, I apprehend, can be found. On the contrary, it was decided, in *Fletcher v. Wilkins* (6 East. 283); *Milward v. Caffin* (2 Wm. Bl. 1330), that replevin was a proceeding *in rem* to have the goods again, and

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that there was no such thing in the action as a general recovery of damages. In the complaint in the present case, the plaintiff asks that it may be adjudged that the defendant deliver up to him the property, and pay damages for the detention of it, and, by no analogy derived from the common law, could there be a judgment for the value in such a case.

Replevin in the *detinuit*, as modified by the various English statutes, was substantially embodied in our act of 1788 (Rev. Laws of 1802; R. & R. 96); and, by the Revised Statutes, the whole action was so thoroughly revised, remodeled, and altered, as to become in effect a new action. It was allowed to be brought for the wrongful distraining, taking, or detention of goods or chattels, or by executors or other persons suing in the right of another, where they were authorized to maintain trespass for the wrongful taking of personal property. No action of replevin could be commenced except in the form prescribed by the statute. The course of procedure in it throughout was provided for—the mode to be pursued if the defendant claimed property in the goods, the form of the declaration, the pleas to be allowed, the form of the judgment and of the execution—and the action of *detinue* was abolished (2 Rev. Stat. 521). It was this action, thus extensively altered, changed, and, in fact, recreated, which was continued by the Code, and of which it was obviously the design of the act of 1862 that the Marine and Justices' Courts should have cognizance. Whenever that act, therefore, or the Code, has omitted any thing essential to the conduct and determination of the action, the Revised Statutes are to be followed. The provision which the Revised Statutes have made for judgment in a case like this, is essentially the same as the provision in the Code, and the judgment should have been entered in that manner. But it is not necessary to reverse the judgment for this reason, and require the plaintiff to bring another action, but we may order the judgment to be modified under the 330th section of the Code, so as to change it into a judgment in the alternative for a return of the property, or for its value, if a return cannot be had (*Wood v. Kelly*, 2 Hilt. 334; *Fitzhugh v. Wiman*, 5 Seld. 565; *Bate v. Graham*, 1 Kern. 240; *Cady v. Allen*, 22 Barb. 288).

Judgment accordingly.

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 ARTHUR SHORT *and another* v. GIDEON LEE KNAPP.

The plaintiff having led his horses, which were gentle and reliable, upon the defendant's ferry boat, left them, unattended, for a few moments. Being frightened by the boat's whistle, the horses, while thus unattended, started off, and, leaping over the guard chain at the end of the boat into the river, one of them was drowned. There were no facilities on the boat for tying horses; the guard chain was not sufficiently elevated to stop the horses in their flight, and no one was employed on the boat to take the care and custody of horses or other animals. It was shown that the driver could not have stopped the flight of the horses, even if he had been at their head or on his box, owing to the slippery state of the boat's deck and the sudden movement of the horses.

Held, That the court was right in leaving the question of plaintiff's contributory negligence to the jury, and in not granting a nonsuit asked for on that ground.

Although the plaintiff may have been guilty of negligence, yet, if the exercise on his part of ordinary care would not have prevented the injury caused by the defendant's negligence, the court will not say, as matter of law, that the plaintiff's negligence contributed to the injury suffered.*

* As the result of the English and American decisions upon this point, the rule is stated, in a recent treatise (Shearman & Redfield on Negligence, sec. 32), to be, that "the plaintiff's negligence, or other fault, is of no importance, if it did not contribute to bring upon him the injury (*Norris v. Litchfield*, 85 N. H. 271; *Alger v. Lowell*, 8 Allen, 402; *Churchill v. Rosebeck*, 15 Conn. 359; *Robinson v. Pioche*, 5 Cal. 460; *Brown v. Illius*, 27 Conn. 84; *Haley v. Earle*, 30 N. Y. 208; *Card v. N. Y. & Harlem R. Co.* 50 Barb. 39); nor, it has been said, unless it substantially contributed to the injury (*Daley v. Norwich &c. R. Co.* 26 Conn. 591; *West v. Martin*, 31 Mo. 375). The defendant is not excused by any negligence of the plaintiff, which does not amount to a want of ordinary care on the part of the latter in avoiding the consequences of the defendant's negligence (*Brown v. N. Y. Central R. Co.* 31 Barb. 385; 32 N. Y. 597; *Davies v. Mann*, 10 Mees. & W. 546; *Bridge v. Grand Junc. R. Co.* 3 M. & N. 244). His negligence must not only concur in the transaction, but co-operate in causing the injury, or exposing him or his property to it (*Carroll v. New Haven R. Co.* 1 Duer, 571; *Colgrove v. New Haven R. Co.* 20 N. Y. 492; *Greenland v. Chaplin*, 5 Exch. 243). If the injury certainly would have occurred, notwithstanding the exercise of due care by the plaintiff, his omission to take such care is immaterial. Negligence on the part of the plaintiff, tending merely to increase the damage suffered by him, is no bar to his action (*Thomas v. Kenyon*, 1 Daly, 132; *Tuff v. Warman*, 5 C. B. [N. S.] 573; *Kerwacker v. Cleveland & C. R. Co.* 3 Ohio St. 172; *Trow v. Vermont Central R. Co.* 24 Verm. 494; *Butterfield v. Forrester*, 10 East, 60)."

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APPEAL by the defendant from a judgment of the Seventh District Court.

The action was brought to recover the value of one of a pair of horses, alleged to have been lost through the negligence of the defendant. The facts elicited upon the trial are fully stated in the opinion of the court. At the close of the plaintiffs' case, the defendant moved for a nonsuit, on the ground that no negligence was shown on the part of the defendant, and gross negligence on the part of the plaintiffs. The motion was denied, and the case left to the jury, with proper instructions. The jury rendered a verdict for the plaintiffs, from the judgment entered on which this appeal was taken.

Spring & Whetmore, for appellant, on the point that the defendant was not liable as a common carrier, no delivery to him of the plaintiffs' property being shown, cited *Cohen v. Frost*, 2 Duer, 335; *Blanchard v. Isaacs*, 3 Barb. 388; *Tower v. Utica & S. R. Co.* 7 Hill, 47; *White v. Winnisimmet Co.* 7 Cush. 155. On the point of the plaintiffs' contributory negligence, they cited *Wilds v. Hudson River R. Co.* 24 N. Y. 430; *Button v. Hudson River R. Co.* 18 Id. 248; *Wilkinson v. Farrie*, Am. Law Rev. February, 1863.

Alexander H. Reavey, for the respondents, cited *Dyert v. Bradley*, 8 Wend. 469; *Keller v. N. Y. Central R. Co.* 24 How. Pr. 172; *Harring v. N. Y. & Erie R. Co.* 13 Barb. 9; *Labar v. Koplín*, 4 N. Y. 547; *Clark v. Kirwan*, 4 E. D. Smith, 21; *Eakin v. Brown*, 1 Id. 36; *Center v. Finney*, 17 Barb. 94; 22 N. Y. 209; *Mudgett v. Bay State Steamboat Co.* 1 Daly, 155.

BY THE COURT.—BRADY, J.—The plaintiffs' horses, with carriage attached, were led by one of the plaintiffs, who was acting as the driver of the team, on board of the defendant's ferry boat, at the foot of Twenty-third street and the East river. There was no light at the ferry gate nor upon the boat. It was about half past five in the morning, and very dark. The deck of the boat was slippery, although the driver who led the horses, as stated, did not notice that fact when he so led

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them on board. There were some persons in the coach, one of whom called to the driver, who went to the door of the coach to see what he wanted. While talking to him, the whistle of the boat blew, and the horses started. The driver told them to stop, and they did so—they were not frightened. The whistle blew again, and the boat moving, caused the horses to start again. The driver hurried to stop them, and did all that he could, but could not stop them, because the deck was slippery. When they started they turned round and went overboard, and one of them was drowned. There was a chain at the end of the boat which, sagging at the center, was not more than twelve inches high at that point, and was not sufficiently elevated to stop the horses, although it did stop the carriage. The driver, at the time the horses started, was talking to his passengers, having one foot on the step of the carriage and one foot inside, and was apparently guilty of negligence in thus leaving his horses; but he testified that, in consequence of the movement made by the horses, and the slippery condition of the deck of the ferry boat, it would have been impossible for him to have stopped the horses, even if he had been at their head or on his box—a fact to which others accustomed to manage horses also testified, and corroborated his evidence on that subject. Several witnesses also testified in reference to the chain, its arrangement, its sagging in the center, and its insufficiency for the purpose for which it was intended. The evidence given on behalf of the defendant made a conflict upon the various elements of the plaintiffs' case—as to the elevation of the chain—the ability of a person to stop the horses if standing at their heads—the position of the driver when the horses started, and the condition of the deck. Under the circumstances disclosed, the plaintiffs' right to recover depended upon the absence of any negligence on their part which contributed to the injury sustained. The jury were so instructed. If the driver had been upon his box, or standing at the heads of his horses, there could be no doubt about the right of the plaintiffs to recover, inasmuch as the horses were shown to be gentle and reliable, obedient to command, and not inclined to run away, and there was proof establishing the fact that the guards used

by the defendant on his boat were not sufficient for the purpose intended—that there was no place to tie the horses, and no proof that any person was employed on board of the boat who was charged with the care or custody of these or any other horses. Assuming this conclusion to be correct in principle, it follows that, if the driver, being on his box or at the heads of the horses could not have arrested them, his absence from both the places designated was not, *per se*, evidence of negligence contributing to the injury suffered. The facts and circumstances were to be considered and passed upon, and if the jury thought the plaintiffs guilty of negligence, they could not recover. For these reasons the justice did not err in refusing to dismiss the complaint. It does not follow, because the plaintiffs may have been guilty of negligence, that they cannot recover. The negligence must, in some degree, contribute to the injury, and, unless it does, it cannot affect the right to indemnity (*Haley v. Earle*, 30 N. Y. 208). Although the liability of a common carrier of animals is not, in all respects, the same as that of a carrier of inanimate property, and although he is not an insurer against injuries arising from the nature and propensities of animals, yet, if diligence and care can prevent them, he is bound to the exercise of such diligence and care (*Clarke v. Rochester & Syracuse R. R. Co.* 14 N. Y. 570).

“It is the duty of a ferry company to have all suitable and requisite accommodations for the entry upon, the safe transportation while on board, and the departure from the boat of all horses and vehicles passing over such ferry.” They are also required to provide “all proper and suitable guards and barriers on the boat for the security of the property thus carried, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveler” (per Dewey, J., in *White v. The Winnisimmet Co.* 7 Cushing, 157). Accepting this statement of the duties devolving upon ferry companies, as a concise and ample exposition of them in reference to the subject under consideration, and more particularly since the case from which it is extracted was cited by the defendant’s counsel, it is established by the verdict of the jury that the defendant’s boat had not

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suitable guards and barriers to prevent damages from such casualties as the plaintiffs' property would naturally be exposed to. It is true, that the plaintiffs did not recover in the case just referred to, but it was for the reason that they had contributed to their injuries by their own negligence. The opposite finding on conflicting evidence sustains the judgment in this case, the jury having been instructed by the justice not only in relation to the plaintiffs' negligence, but also that the defendant was not liable unless the damages sustained by the plaintiffs were occasioned by the defendant's negligence. Upon an examination of the case in reference to the propriety of the verdict, we cannot say that it was not just. It appears clearly that the plaintiffs' horses were frightened by the act of the defendant's servant who blew the whistle, and that defendant was, therefore, in fact, the original impelling cause of the accident. Whether the use of the whistle did not impose additional caution on behalf of the defendant is a question upon which we are not called upon to express an opinion, but if such use of it is necessary in conducting the business of the ferry, or the navigation of its boats, it would seem, from the events which this case has proven, to call upon the defendant to employ ampler means for the security of passengers and animals than those adopted. We cannot interfere with this judgment. The evidence admitted under the defendant's objection, bore directly upon the question of negligence, and was pertinent and proper, and the jury were properly instructed upon the legal rules by which their deliberations were to be governed. The judgment should be affirmed.

Judgment affirmed.

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ELIZABETH KIMMELL v. FREDERICK BURFEIND.

Although a third person may be guilty of negligence in the manner of using the defendant's premises, with the latter's permission, yet where such use, harmless in itself, is rendered hazardous to others by the defendant's neglect to provide sufficient fixtures to his premises, the latter will be liable for the consequences of such neglect.

A landlord having discontinued the use of gas upon his premises, removed the fixtures from the gas pipes, leaving the latter open and uncovered, in the apartments which were afterward let to, and occupied by, the plaintiff. The landlord subsequently gave to the tenant of a lower floor of the premises, permission to introduce gas into the house, which the latter did. In consequence of the gas pipes in the plaintiff's apartments being open, the room became filled with gas, and an explosion took place, causing injury to the plaintiff. *Held*, that the landlord was guilty of negligence, and, in the absence of contributory negligence on the plaintiff's part, was liable in damages for the injury sustained.

Where in an action for negligence, the justice before whom the cause was tried did not pass upon the question whether the plaintiff was guilty of contributing to the injury by his own fault, but dismissed the complaint upon the sole ground that the defendant was not liable as matter of law, the court will not, upon appeal, inquire whether or not the plaintiff was guilty of negligence, for the purpose of affirming the judgment.

APPEAL by the plaintiff from a judgment of the Sixth District Court dismissing the complaint.

The action was brought by the plaintiff, who was a tenant of the defendant, to recover damages for injuries sustained by her by reason of an explosion of gas in her apartments. It appeared that the plaintiff hired of the defendant the second floor of premises in New York City. At the time of the hiring there was no gas-meter in the house. There were gas pipes in the house, and in the rooms hired by the plaintiff. The vents of the pipes were open at the time of hiring, a fact known to the defendant. Subsequently to the hiring, the defendant gave permission to another tenant, occupying a lower portion of the house, to put in a gas-meter. This permission was given and acted upon without the knowledge of the plaintiff. The plaintiff was absent when the meter was attached to the gas pipes, and on her return, found a great smell of gas in

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the house. She did not then know that the gas-meter was in any way connected with the pipes in her room. The defendant then ordered the gas to be turned off. After waiting twenty minutes, the plaintiff went into her room, and as she entered her room the gas therein exploded and injured her severely. The vent of the gas pipes had not been closed when the gas-meter was put in, and the gas escaped in such quantities that the plaintiff's rooms were filled with it.

The justice dismissed the complaint on the express ground that the defendant was not guilty of negligence, without passing upon the question, whether or not the plaintiff had been guilty of negligence in entering the room as she did.

The plaintiff appealed from the judgment.

Raymond & Coursen, for appellant, relied upon *Eakin v. Brown*, (1 E. D. Smith, 36).

Charles Cheney, for the respondent, contended that the defendant could only be made liable upon the principles making a master liable for the negligence of a servant, and that that relation did not exist between the landlord and the tenant who was authorized to introduce the gas, nor between the landlord and the gasfitter; and cited *Blake v. Ferris* (5 N. Y. 48); *Pack v. Mayor &c. of New York* (8 Id. 222); and *Kastor v. Newhouse* (4 E. D. Smith, 20).

BY THE COURT.—BRADY, J.—The plaintiff hired from the defendant the second floor of the premises, 61 West 18th street. The defendant also rented the basement of those premises to a man named Newman, who occupied it as a bakery. In the front room of plaintiff's apartments there was a gas pipe or fixture, which was neither covered nor stopped. The defendant gave to Newman permission to introduce gas, and he did so on the 24th July, 1865, during the absence of the plaintiff from the premises. When the plaintiff returned to the house, she discovered that gas was escaping, and notified the defendant thereof. He tested the pipe in the hallway, and found the gas escaping there. He then tested the pipe in the back room,

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occupied by the plaintiff, and found that the gas did not ignite. He did not go into the front room. The plaintiff further testified, "We told him to turn off the meter, and I supposed he did so; and then, when I ventured to take a candle in the front room, it exploded." The defendant admits that he said he would go down and "turn off the meter;" but he was unable to do so, and sent his clerk, who did it. He did not advise the plaintiff that any delay had taken place in reference to that event; and he did not advise her not to go into the front room. After telling the defendant, however, to "turn off the meter," the plaintiff aired the house about twenty minutes, and then went into the room. It also appeared that Newman put in the meter, and introduced the gas, without informing the defendant of it. It further appeared that defendant told Newman, when he wanted the gas, he "must have the pipes upstairs cut off;" and that Newman directed the gas man to do so, and asked him subsequently if every thing was right, and he said yes. The justice, on these facts, found for the defendant. He did not pass upon the question, which, assuming the defendant to be liable, was the real issue in the case, and which was, whether the plaintiff had not, by her own negligence, contributed to the injury which she had sustained. The plaintiff must be regarded as having knowledge of the danger of using a light in the front room, for two reasons, namely: she knew that the gas was escaping; and that the pipe in her room was not covered or stopped. Whether a sufficient time had elapsed after the defendant undertook to cut off the gas, to remove the impending danger, by airing the premises, was the element upon which the plaintiff's negligence depended. There was evidence bearing upon the question of negligence on both sides; but, as already suggested, it was not passed upon. The justice held that the defendant was not liable in any event, but that the gas man was responsible, having failed to accomplish what he undertook, in reference to cutting off the gas from circulation through the pipes in the upper part of the premises in question. Assuming the plaintiff free from any negligence, which would prevent her recovery, is the defendant liable to her for the damages sustained? It is said in *Eakin v. Brown* (1 E. D. Smith, 36), that "if the owner let to one the first

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floor, and by reason of his negligent introduction of an insufficient fixture on the second or any other floor, whether in the actual occupation of himself, or of a second tenant, the tenant below suffers damage, he may have recourse to his landlord." Assuming the doctrine declared by that case to be correct, the defendant was liable, and the finding of the justice was erroneous. He had introduced an insufficient fixture, and its insufficiency might be dangerous to property and to life. It became so, being uncovered and not stopped, as soon as the gas was permitted to flow into it. He was, therefore, guilty of a violation of the obligation which enjoins care and caution, and of a duty which he owed to his tenant; and having been guilty of these violations, he was also guilty of negligence, and responsible for the consequences. This case is analogous to *McCahill v. Kipp* (2 E. D. Smith, 413), in which we held that an owner was liable for damages caused by his horse running away, where the servant in charge of him had not properly secured him, although the consequences of the accident were also chargeable upon a third person, who caused him to run, by carelessly frightening him. Although Newman may have been guilty of negligence in not advising the plaintiff that he intended to introduce the gas, and in not ascertaining that the gas did not enter into the pipe leading into the plaintiff's room, and in that way have been instrumental in doing the mischief accomplished; yet the defendant is the primary cause. He put in the pipe, and removed the fixture, leaving it open; and by authorizing Newman to introduce the gas, gave him the power to work the injury by an act which would have been entirely harmless, as it was certainly lawful, had the pipe been properly secured, as it should have been. For these reasons the judgment must be reversed. The justice has not found upon the whole of the issues. He did not consider the question whether the plaintiff had, by co-operating negligence, sustained the injury complained of. His opinion shows this to be so. Not having passed upon that question, if we did it, it would be a decision of the general term of this court, upon an issue which the justice considered immaterial, and did not pass upon. The judgment should be reversed.

Judgment reversed.

STEPHEN T. CLARK *v.* JAMES BROOKS *and* ERASTUS BROOKS.

The strict rules which have been applied in courts of law, for the determination of motions for new trials, have never been recognized in courts of equity. The general rule in equity cases, where issues of fact have been sent to a jury for trial for the information of the court, is, that whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or misdirection on the part of the judge, a new trial will not be ordered unless the court, taking the whole of the evidence together, and connecting it with the judge's charge, thinks that injustice has been done by the error committed, and is dissatisfied with the verdict.

Although, in ordinary cases, the court will grant a stay, pending an appeal from an order denying a motion for a new trial, yet where the property in controversy includes the good-will of a business, *e. g.*, the publication of a newspaper, which has been carried on pending the litigation by a receiver, the court will not stay a sale, after protracted litigation, without some guaranty, on the part of the party asking it, against depreciation in the value of the property, pending the stay.

APPEAL by the defendants from an order denying a motion for a new trial.

The action was brought for the purpose of settling a copartnership alleged to have existed between the plaintiff and the defendants, in the publication of the newspaper, "The New York Express."

Issues were framed, on motion, as follows :

First.—What were the respective interests of the plaintiff and defendants in the copartnership mentioned in the pleadings in this action, from the thirtieth day of November, 1855, to the first day of January, 1863.

Second.—What were the respective interests of the plaintiff and defendants in the said copartnership mentioned in the pleadings in this action, from the first day of January, 1863, until the first day of July, 1863.

Third.—Did the plaintiff at any time between the thirtieth day of November, 1855, and the first day of July, 1863, use the credit and character of the newspaper establishment mentioned in the pleadings in this action, and his time and atten-

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tion in private trade and speculation, and did such trade or speculation deprive the said partnership of any of the skill, industry, time, or attention of the plaintiff, to which it was entitled, or did the same give the plaintiff an interest adverse to the partnership or his duty thereto.

These issues were tried by a jury, and after verdict found, the court ordered judgment for the plaintiff, and, among other things, directed a sale of the partnership property.

The defendants moved for a new trial, and the motion being denied, they appealed.

Frederick Smyth, John McKeon and Edwards Pierrepont, for appellants. If evidence has been improperly received on a trial, a new trial will be granted, even though the judge changed his ruling and directed the jury to disregard the evidence (*Erben v. Lorillard*, 19 N. Y. 299; *Williams v. Fitch*, 18 N. Y. 550; *Whiting v. Otis*, 1 Bosw. 424; *Farmers' Bank v. Whinfield*, 24 Wend. 420; *Myers v. Malcolm*, 6 Hill, 296; *Osgood v. Manhattan Co.* 3 Cow. 612, 621; *Marquand v. Webb*, 16 Johns. 89; *Antoine v. Coit*, 2 Hall, 40; *Strang v. Whitehead*, 12 Wend. 64; *Penfield v. Carpenter*, 13 Johns. 350).

Henry A. Cram and E. Randolph Robinson, for respondent. A court of equity will not grant a new trial of an issue merely on the ground that the judge received improper testimony on the trial of the issue, or rejected that which was proper, although a court of law in that case would grant a new trial, if, on the whole facts and circumstances, the court is satisfied that the result ought not to have been different (*Pemberton v. Pemberton*, 11 Ves. 52; *Hampson v. Hampson*, 3 Ves. & Beames, 41; *Barker v. Ray*, 2 Rus. 63; *Savage v. Carroll*, 2 Ball & Beaty, 444; *Tucker v. Wilkins*, 4 Sim. 256; see also, to the same effect, *Apthorp v. Comstock*, 2 Paige, 483; *Muloch v. Muloch*, 1 Edw. Ch. 18; *Jones v. Zollicoffer*, 2 Hawks (N. C.) 492; *Bassett v. Johnson*, 1 Green's Ch. (N. J.) 154; and in *Forrest v. Forrest*, 25 N. Y. 509, per Wright, J.)

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By THE COURT.—DALY, F. J.—The plaintiff brought his action for the dissolution of a copartnership, existing between himself and the defendants, in the *Express*, a daily newspaper, and for the taking of an account, claiming that he had an interest of one-sixth. The defendants insisted that his interest was only one-sixth of two-thirds, and, upon the defendants' application, it was ordered that the point in dispute should be tried by a jury.

The trial was a long one, and fills a volume of more than four hundred printed pages. It was most exhaustive in respect to the subject-matter. Great latitude was allowed to the defendants upon the cross-examination of the plaintiff Clark; in the examination of their own principal witness, James Brooks, and by the admission of a large amount of testimony, much of it under the plaintiff's exception, consisting of newspaper extracts, and the evidence of many witnesses relating to the speculations of the plaintiff in stocks, and as to his management of the money article in the *Express*, and there was an extensive examination of the books of account and business transactions of the newspaper, extending over the whole time of Clark's active connection with it, a period of more than seven years. Great attention was paid by the jury to the testimony during the whole investigation. The pertinent and suggestive questions put by them, especially during the examination of the books of account, and in respect to details in the business management of the paper, exhibited so much intelligence and practical business knowledge, that I was induced, in my charge, to make especial reference to the attention they had shown, to the intelligence manifested by their inquiries, and to say that I doubted whether a better jury could have been found for the discharge of the duty imposed upon them.

Forty-one exceptions were taken by the defendants during the progress of the trial, embracing exceptions to the admission or to the rejection of testimony, or to the ruling of the court upon questions of law, but one of which is considered, in the opinion of my colleague, as a ground for granting a new trial, and that was allowed upon the settlement of the case under peculiar circumstances. No memorandum of this exception was

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to be found in my own notes, nor in those of any of the counsel upon either side, nor in the notes of the stenographer. It was to the admission of declaration made by Clark to his attorney, Mr. Bangs, which, from my familiarity with the rules of evidence, I would have supposed I could not have admitted under an exception, but for the fact that it was the impression of the two counsel for the defendants that I did, and I allowed it in deference to their better recollection. Regarding it, therefore, as testimony erroneously admitted under exception, the question arises, whether the reception of it constitutes, in a case like this, a sufficient reason for ordering the cause to be tried over again.

This was an equity suit, in which the defendants were not entitled, as a matter of right, to a trial by jury, but in which the court, in the exercise of its discretion, directed certain facts to be ascertained by the verdict of a jury, and in such a case new trials are not granted with the same facility, nor, in all instances, for the reasons which would be sufficient in an action at law.

Where an issue of fact is joined in an action of law, the verdict of the jury, if not disturbed, is final, and the judgment of the court is given in accordance with it. For this reason it has been deemed more important that courts should, upon such trials, enforce the principle that the rights of parties are to be determined strictly by legal evidence, and the most effectual means of enforcing it is to order a new trial, if improper evidence is submitted against the remonstrance and objection of the party complaining. Hence it has been held in this State, that a new trial will be granted in an action at law where erroneous evidence is admitted under exception, unless it is shown that the verdict was not affected by it. That it will not suffice that the party excepting was not probably injured by it, but it must be shown beyond a doubt that he could not have been prejudiced by it (*Anthoine v. Coit*, 2 Hill R. 40; *Gillett v. Mead*, 7 Wend. 193; *Clark v. Vorce*, 19 Id. 232; *Farmers' Bank v. Whinfield*, 24 Id. 419; *Clark v. Crandall*, 3 Barb. 613; *Dresser v. Ainsworth*, 9 Id. 619; *Boyle v. Coleman*, 13 Id. 42; *Williams v. Fitch*, 18 N. Y. 546; *Erben v. Lorrillard*, 19 Id. 299). This, in most cases, it is difficult to show, as it is gener-

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ally impossible to say what effect the evidence may or may not have had upon the minds of the jury, and it is for this reason that it has been held, that the proper course in such a case is to grant a new trial (*Marquand v. Webb*, 16 Johns. 89; *Osgood v. The Manhattan Co.* 3 Cow. 612). But even upon this point the authorities in this State are by no means harmonious, for it has also been held that though such evidence was objected to, a new trial would be denied, unless there should be strong probable grounds for believing that the merits had not been fully and fairly tried, and that injustice had been done (*Crary v. Sprague*, 12 Wend. 47; *Northrup v. Wright*, 24 Wend. 223; *Depuyster v. Columbian Insurance Co.* 2 Cai. 90). And Judge Wright, in *Forrest v. Forrest* (25 N. Y. 510), says that it is hardly the rule now in courts of law that a new trial must be granted, because evidence has been received that ought to have been rejected, for that "latterly even these courts undertake to judge for themselves as to the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence, they have refused a new trial." The same want of agreement exists in the English courts. In the Common Pleas, a new trial will not be granted for the admission of improper testimony, if there is enough evidence in the case to warrant the verdict, and if, in their judgment, the evidence improperly admitted, ought to have had no effect (*Doe v. Taylor*, 6 Bing. 561; *Horford v. Wilson*, 1 Taunt. 14; *Nathan v. Buckland*, 2 Moore, 153). While the King's Bench has refused, after mature consideration, to follow the rule of the Common Pleas, and declare that they will not undertake to determine such a question, as they cannot say what effect the evidence may have had upon the minds of the jury, and that, if they refused to grant a new trial, when inadmissible evidence has been received under exception, it might cause the rules of evidence upon trials to be less carefully considered (*Crease v. Barrett*, 5 Tyrwh. 475; *De Rutzen v. Farr*, 4 Ad. & E. 53). The rule of the King's Bench has hitherto been the prevailing one in this State, while, in most of the other States of the Union, the rule of the Com-

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mon Pleas, after a full examination of the subject, has been adopted as the one which the result of experience has shown to be the best adapted for the attainment of the ends of justice (*Hamblett v. Hamblett*, 6 New Hamp. 333; *Deerfield v. Northwood*, 10 Id. 269; *Prince v. Shephard*, 9 Pick. 176; *Thompson v. Lothrop*, 11 Id. 336; *Thorndike v. Boston*, 1 Met. 242; *Page v. Homan*, 2 Shep. 478; *Commonwealth v. Shephard*, 6 Binney, 283; *Steelman v. Steelman*, 1 Harr. 66; *Barringer v. Nesbitt*, 1 Smedes & Marsh, 22; *Carrol v. Mays*, 8 Dana, 533).

But the strict rule which has been applied in courts of law, has never been recognized in courts of equity. Where a trial by jury has been directed in a suit in equity, to ascertain certain facts, the trial is simply for the information of the court, with whom the ultimate decision of the case rests, and it is not therefore necessarily conclusive. The court, says Mr. Gresley, in his work upon Equity Evidence, "may, if it thinks fit, make no use of the verdict, but treat it as a nullity. It will often pay no heed to the most flagrant misdirection on the part of the judge, or mistakes as to the admission of evidence, if the court is satisfied that the verdict is as it ought to have been, upon the evidence which is sound, and it may either send the case back to another jury, or decide it even in the teeth of a verdict" (Gresley upon Evidence in Courts of Equity, pp. 527, 528). Although a court of equity would have been satisfied if the verdict had been the reverse of what it is, it will not, for that reason, send the case back for another trial. There must be something which shows that the verdict is clearly wrong—something which satisfies the court that it cannot be right (*Northern Bridge and Road Co. v. London & Southampton Rail Co.*, 11 Simmons, 42). The test in every case is the satisfaction of the conscience of the court, and this standard, as Mr. Gresley has remarked, being itself so vague, the rules in equity, for granting a new trial, are necessarily indefinite. The only general rule to be obtained from an examination of the cases, is, that whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or misdirection on the part of the judge, another trial will not be ordered, unless the court, taking the whole of the evidence to-

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gether, and connecting it with the judge's charge, thinks that injustice has been done by the error committed, and it is dissatisfied with the verdict (*Head v. Head*, 1 Turn. & Russ. 141; *Baxter v. Ray*, 2 Russ. 63; *Winchelsea v. Wanchape*, Id. 446, 454; *Slancy v. Wade*, 7 Sim. 595; *Northern Bridge Co. v. London & Southampton Railway Co.*, Id. 42; *O'Connor v. Cook*, 8 Ves. 532; *Warden of St. Paul's v. Morris*, 9 Id. 165, 169; *Pemberton v. Pemberton*, 11 Id. 52; *Booth v. Blundell*, 19 Id. 503; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Tatham v. Wright*, 2 Rus. & Myl. 1; *Apthorpe v. Thomas*, 2 Paige, 482; *Murlook v. Murlook*, 1 Edw. c. 18; *Paterson v. Ackerson*, Id. 96; *Lansing v. Russell*, 13 Barb. 520; *Trenton Banking Co. v. Russell*, 1 Green. c. 511; *Lyles v. Lyles*, 1 Hills, c. 76; *Gilman v. Cameron*, 1 Geo. Decis. 142; *Clayton v. Farrington*, 33 Barb. 146; *Forrest v. Forrest*, 25 N. Y. R. 512).

Applying this rule to the present case, there is no ground for a new trial, as all that was given in evidence, by proving what Clark said to his attorney, Mr. Bangs, was substantially established and affirmed in every material particular afterward, by the testimony of James Brooks himself, so that the evidence could have had no injurious effect upon the result, or operated in any way prejudicially to the defendants. This is even the rule in courts of law, in which a new trial will not be granted, if facts are clearly proved by competent testimony, and the jury have found in accordance with them, though in a certain stage of the case improper evidence may have been admitted, establishing or tending to prove the same facts (*Mayor v. Wittberger*, Geo. Dec. Part 11, 20; *Prince v. Shephard*, 9 Pick. 176; *Thompson v. Lathrop*, Id. 336; *Emmon v. Lord*, 6 Shep. 351; *Hutchinson v. Moody*, Id. 393; *Bunting v. Allen*, 3 Harr. 299; *Steelman v. Steelman*, 1 Id. 66; *Barrington v. Nesbitt*, 1 Smedes & Marsh, 22).

The plaintiff, to show that his interest was that of one-sixth, relied upon a written paper, Exhibit C, signed by James Brooks, in which it is declared that he was the owner of two-thirds of the *Express*, and that he would, on the 1st of January, 1856, sell to the plaintiff one-sixth of his interest in the paper, *thereby reducing his own interest in it to one-half*, for the sum of

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\$13,333 $\frac{1}{3}$; \$2,500 of which was to be paid upon the delivery of this memorandum, and which \$2,500 James Brooks admitted that he had received. This memorandum of an agreement, thereafter to be executed, was dated the 30th of November, 1856, and would have been conclusive upon the point in dispute, but for the fact of the existence of another paper, bearing the same date, a copy of which the plaintiff served with his complaint, which was signed by James Brooks, and which transfers to the plaintiff *one-sixth* part of James Brooks' interest in the paper, which is declared by it to be two-thirds of the whole.

It lay with the plaintiff to account for the conflict between these two instruments, by one of which one-sixth of the whole was to be, and, by the other, one-sixth of two-thirds was transferred, both being of the same date. The plaintiff testified, that after making up the account in January, 1860, he told James Brooks that he wanted something more than the first memorandum, and suggested that there should be a formal bill of sale, and that he would give Brooks a chattel mortgage, securing him for the balance which was due him, and to which Brooks assented. That accordingly he went to his lawyer, Mr. Bangs, to get a mortgage and a legal bill of sale from James Brooks drawn, to be executed in place of what he regarded as an informal memorandum. That he gave Bangs the memorandum, Exhibit C, and instructed him as to what he wanted; that Bangs drew a paper, as the plaintiff supposed, in accordance with the memorandum, and with the instructions that had been given. That Bangs gave him the paper and he gave it to Brooks, and told him it was the bill of sale that Bangs had drawn, and asked him to examine it; that Brooks returned it to him in a few days, and that he kept it in his desk for three years, not being able to get it executed. That, at the end of that time, having paid up the residue of the purchase money, he desired to have a formal article of copartnership executed, which was agreed to by the defendants, and that in December, 1862, he went to another lawyer, Mr. Lawton, and employed him to draw the articles, at the same time giving him the paper which Bangs had prepared without examining it, and requested him to make a copy of it, that it might be ex-

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ecuted. That he received the draft of the articles of copartnership, and the copy of the bill of sale, and on the 30th of January, 1863, the articles were signed by himself and James and Erastus Brooks, and the bill of sale was executed by James Brooks and witnessed by Erastus Brooks. This bill of sale, Exhibit A, is the one already referred to as transferring only one-sixth of two-thirds. It was shown to have been copied by Lawton's clerk, from another paper, but the clerk could not say from whom he had received the original paper. The articles of copartnership which took effect from their date, the 1st of January, 1863, declare that the plaintiff and James and Erastus Brooks are the owners of the *Express*; James Brooks of the one-half, Erastus of one-sixth, and the plaintiff of one-sixth; and that *as such owners* and proprietors they had *therefore* published the *Express* under the name of J. & E. Brooks, and that they had for the purpose of continuing the paper and carrying on the business establishment thereof, agreed to become copartners under the name of J. & E. Brooks & Co. The plaintiff also testified that the paper prepared by Bangs, the original of Exhibit A, was destroyed by him, together with an unexecuted mortgage prepared by Bangs, upon clearing out the papers from his desk, some time between the execution of the articles of copartnership and the commencement of this suit, that is, between the 30th of January and the 1st of July, 1863. That he destroyed them with other papers supposing them to be of no further use; and that he never discovered that Exhibit A was different from Exhibit C, until his attention was called to it, after the commencement of this suit. That he supposed the mortgage was the same as Exhibit A, upon the supposition, that if Bangs made a mistake in the one, he continued it in the other.

The plaintiff then called Bangs. He remembered the plaintiff calling upon him, but could recollect only one interview. He was asked what transpired, to which the defendant objected; the objection was overruled and the defendants excepted. The witness then stated that the plaintiff brought him a paper, and was about to state what occurred between the plaintiff and himself, when the defendants objected; the objec-

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tion was overruled, and the defendants excepted. Bangs then testified that the plaintiff exhibited to him the paper as containing the terms of arrangement for the purchase, by him, of an interest in the *Express*. That he could only state the substance of the instructions he had received. That they were substantially that the paper brought by the plaintiff had been in existence for some time, and that nothing had been executed to carry it out; that the plaintiff wanted a paper executed to carry out the one shown by him to the witness, and that his instructions were to draw such a paper. That Clark said something about the property of the *Express* consisting of subscription lists, type, &c., and that they agreed that the larger part of the property of a newspaper establishment was somewhat indefinite. This was the whole of the evidence of what the plaintiff said to Bangs, and for the admission of which; the defendants ask to have a new trial. Bangs further said upon the direct that he drew a paper for the plaintiff, but he had no recollection of delivering it to any one, although he had no doubt that he did. That he recollected that the paper shown to him by the plaintiff was a blue one and a short one, but he did not remember its contents, but this latter evidence, even if it had been excepted to, was admissible, the question being, how these two conflicting papers, of the same date, came to be executed.

The witness was cross-examined by the defendants, and the result of it was this: that he tried to be a careful man in drawing papers, but he had made mistakes. Would not say that he had in this instance, for he did not know. It was always a rule with him to read a paper to a party after it was drafted, to see if it expressed what the party meant, but he had a doubt whether he had read the paper he prepared in this instance to the plaintiff, as he had no recollection of delivering it. He had not the slightest recollection of the details of it. Exhibit C he did not recognize, nor Exhibit A, but he may have seen it. He then read both papers, and said that he had drafted a paper like Exhibit A. That, as nearly as he could recollect, the paper he drew corresponded in substance with Exhibit A. That he prepared a paper, which, *according to his*

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recollection of its contents, corresponded substantially with Exhibit A. That it was his impression that the paper which the plaintiff showed him was not left with him; that his recollection was, that he became acquainted with its contents, and then drafted the paper which he drew.

The substance, then, of this witness's testimony was, that the plaintiff had brought a paper to him, of the details of which he had not the slightest recollection, and that he drew a paper from it for the plaintiff, the contents of which to the best of his recollection, corresponded with Exhibit A. So far, therefore, as his general testimony went, it was as favorable for the defendants as for the plaintiff.

James Brooks testified, that about the time referred to by Bangs, a paper corresponding with Exhibit A, was brought to him, together with a chattel mortgage, by the plaintiff. That he told the plaintiff that there was no use in his giving a chattel mortgage, that they could get along amicably; that he, the plaintiff, was paying the purchase money, and would pay it in due time, and that he would have his conveyance in legal time. That they were trusting each other, and that he, Brooks, did not see any necessity for drawing papers in a legal form because they could get along as partners, so that the fact of the preparation and existence of these papers was established also by the testimony of Brooks. He also proved that the paper under which they were doing business, when the interview occurred with Bangs, had been in existence for some time, and that nothing had been executed to carry it out until January, 1862. He said it was signed by him in January, 1856. That it was a memorandum of the arrangement made in these words: "I *will* sell and deliver to Clark one-sixth of my two-thirds interest, giving him the assets for his share." That it was the proposition contained in Exhibit A; so that, for all that appears from this portion of the testimony of Bangs, this may as well have been the paper which the plaintiff brought to Bangs, and to which he referred as Exhibit C. Bangs did not swear that the paper brought to him was Exhibit C, for he had not the slightest recollection of its contents; nor did this inadmissible testimony in any way

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tend to prove it to be so ; nor did it in any way conflict with, or contradict, the testimony of Brooks. It could, therefore, in no way have operated to the prejudice of the defendants. What was said about the property of the *Express*, consisting of subscription lists, types, &c., and of the indefinite character of such property, was entirely immaterial, and had no bearing upon any question involved in the case.

Two facts in the testimony of Bangs, one of which was admissible, even if it had been excepted to, and the other of which was brought out by the defendants upon the cross-examination of the witness, may have had an influence upon the jury. He testified that the paper brought to him was of a blue color, in this respect corresponding with Exhibit C ; and that it was his impression that the paper was not left with him ; that he became acquainted with its contents, and then drew the paper which was the original of Exhibit A. The jury may possibly, from this circumstance, have inferred that Bangs, not having Exhibit C before him, and remembering that the interest of James Brooks was two-thirds, and that the sale was to be made by him, may, by mistake, have drawn the bill of sale and the mortgage for one-sixth of two-thirds only. These two facts, I say, may, in connection with other testimony in the case, have led the jury to that conclusion ; but every other part of Bangs' testimony was as favorable to the defendants as to the plaintiff, or if it had any tendency either way, it was toward producing the impression that the paper brought to him stated the plaintiff's interest to be as it was expressed in the original of Exhibit A.

This will suffice to show that the reception of this testimony had no injurious effect upon the defendants. The same general remark may be applied to the other exceptions. They are too numerous to go over in detail, and I will advert only to those which are contained in the appellants' points. The questions put to Bangs (fols. 515, 517), as to what he would have done in the cases suggested, were inadmissible, as calling for the opinions and conjecture of the witness. The issues to be tried were framed by the questions. Any pertinent evidence was admissible under them, and upon the trial of them the court

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had nothing to do with amending the pleadings. Exhibit C was admissible as documentary evidence directly bearing upon a fact involved in the issues. The manner in which Clark's interest was to be paid for was immaterial; the question being what his interest was. The exception (at fol. 1195) referred to in the defendants' points, was taken by the plaintiff. The witness afterward testified fully as to the conditions which were inquired about by the question put at fol. 710; and the same remark applies to the next question, fol. 711. The question at fol. 1079 was unnecessary and immaterial, as Exhibit 1 showed where the profits of the first six months came from, by deducting the expenses during that period from the next, and they were specifically stated in figures in the exhibit. There was conflicting evidence upon the question, whether the plaintiff used the character and credit of the newspaper in private trade and business. The plaintiff testified that he did not write the money article referred to by General Dix, and he denied that he ever made the statements sworn to by Cockroft, Lawrence, Cohen, &c. It was, therefore, for the jury to judge of the question of relative credibility, and their finding upon the point is conclusive. And upon the other branch of the question, there was no evidence sufficiently certain to warrant a finding that the partnership was deprived of any of the skill, industry, time, and attention of the plaintiff by his speculating in stocks. The appellants' points state that some of the exceptions to the charge of the court were well taken. They are not pointed out; and I find none, in my judgment, were well taken. This embraces a review of all the exceptions relied upon or stated in the defendants' points. And I will now add, that I heard the evidence in this case; that, since the argument, I have read the whole of it carefully over, and collated and compared different parts of it, and my conclusion is, that the weight of the testimony is in favor of the verdict.

BRADY, J., concurred.

CARDOZO, J.—I have read the voluminous case in this matter very many times, but in the view I take of it, it will not

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be necessary for me to allude, to any considerable extent, to the testimony.

It is a singular case in many respects. The main point in dispute was, whether the plaintiff was the owner of one-sixth of the whole or of but one-sixth of two-thirds of the newspaper called the *Express*. Attached to the plaintiff's complaint were two papers, inconsistent with each other, by one of which the smaller interest was conveyed to the plaintiff, and by the other of which it was recited that he was entitled to the larger. Upon the part of the plaintiff it was claimed that, by a paper dated the 30th day of November, 1855, it was agreed that there should be sold to him one-sixth of the whole concern; and that the instrument of the same date conveying to him but one-sixth of two-thirds was designed to fulfill that agreement, and was accidentally erroneously drawn. The defendants insisted that the writing agreeing to sell to Mr. Clark one-sixth of the whole property, was but one of three propositions, all drafted in the form of agreements to sell, signed by Mr. James Brooks, and left with Mr. Clark for consideration, and that that proposition was rejected by Mr. Clark, and one of the others, by which he was to have one-sixth of two-thirds, precisely as specified in the conveyance of November 30, 1855, was accepted by him. The inconsistency exhibited at the start of the case by the conflict between the two papers appended to the complaint, continued throughout it in almost every stage, including the trial of the issues, upon which the two highly reputable gentlemen, plaintiff and defendant, who are the principal actors in the suit, flatly contradicted each other in almost every material and leading point. Mr. Brook's evidence, that he had such confidence in Mr. Clark that he signed almost any thing that the latter presented to him without reading it, and the theory that, having no taste for accounts (which is sustained by Mr. Clark's oath that when all the partners met at Mr. Brook's house in Fifth avenue he went asleep over them), he did not comprehend or acquiesce in those which Mr. Clark says Mr. Brooks received during the partnership, are not more improbable nor more open to remark than the statement of Mr. Clark, that he received from Mr. Bangs a paper which conveyed to him

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but one-sixth of two-thirds of property, when he designed and had instructed the lawyer to make it a bill of sale of one-sixth of the whole; that he read it and kept it in his possession for years, and yet never detected that it varied in that important point from the real agreement and intention, until after the commencement of this litigation. But I do not intend to go through the case to specify the contradictions, or to consider which of the theories of these gentlemen strikes my mind as the more probable, or consistent with the circumstances and the evidence generally.

It will readily be perceived that the conflict was great and irreconcilable, and that, from the nature of the question, any evidence which would corroborate the theory or testimony of the one side, would be likely to be important and effective in deciding the issue against the other; and if any such has been improperly allowed, even conceding that the doctrine of *Forrest v. Forrest*, which is nothing but a reaffirmation of the old rule in chancery, is to be applicable to all equity trials, it seems to me to be impossible to say that, when the question was one of credibility, the erroneous admission of testimony calculated to sustain one side, has not "produced injustice in the general result" to the other. Applying that test—whether the erroneous testimony produced injustice in the general result to the defendants in the case before us—I think a new trial should be allowed, because of the ruling upon the objection to the evidence of Mr. Bangs as to statements made to him by Mr. Clark, the plaintiff, in the absence of the defendants. It was mere hearsay, and I see no principle upon which it should have been received. It is to be observed also, that Mr. Clark, when on the stand, testified about his going to Mr. Bangs, and about the bill of sale being drawn by the latter; but he was not examined as to what he said to Mr. Bangs, when the defendants could have cross-examined him upon its truthfulness; yet Mr. Bangs was permitted, under exception, to tell the substance of what Mr. Clark said to him. I think this, tending as it did to sustain and corroborate Mr. Clark's version, or at least his recollection, in an essential particular, may easily, on a nice question of credibility, have

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turned the jury against the defendants, and that for that reason, especially as the verdict necessarily seriously reflects upon the witness whose evidence must have been disregarded, we ought not critically to review the testimony to see whether the finding of the jury is not so consistent with many circumstances as to require us to pronounce it satisfactory; but seeing that the evidence erroneously received may have influenced the jury to believe Mr. Clark, and to discredit Mr. Brooks, and recognizing that a question of credibility is essentially one proper to be submitted to "men accustomed to examine facts in the light in which people generally view them, rather than in the close method of judges and lawyers," we ought to say that the error may have "done injury" to the defendants, and may "have produced injustice in the general result" (*Forrest v. Forrest*, 25 N. Y. at p. 512); and that, therefore, the verdict should be set aside, and a new trial ordered.

Order denying motion for a new trial affirmed.*

Subsequently, in the same case, pending an appeal to the Court of Appeals from the foregoing decision, the defendants applied to the Court, at special term, for an order staying all proceedings upon the judgment until such appeal could be heard and determined.

The motion was denied, and the defendants appealed.

DALY, F. J.—The undertaking required by section 334 of the Code would not stay proceedings, for the reason that the cases provided for in section 342 are cases in which a judgment is appealed from; and it has consequently been held that that section does not apply to an appeal from an order granting or refusing a new trial (*McMahon v. Allen*, 22 How. 193; *Valton v. The National Loan Fund Life Assurance Society*, 19 Id. 513; *Tiers v. Carnahan*, 3 Abb. 69).

* An appeal was taken from this decision to the Court of Appeals, and, on motion, the appeal was dismissed, on the ground that the judgment was not appealable. The opinion of the court, by HUNT, J., is reported in 2 Abbott Pr. N. S. 404.

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The rule laid down in *Tompkins v. Hyatt*, 19 N. Y. 534; *Hollister Bank of Buffalo v. Vail*, 15 Id.; *Swartwout v. Curtis*, 4 Id. 415, that there must be a final judgment before an appeal can be taken to the Court of Appeals, does not, in my opinion, apply where the appeal is from an order granting or refusing a new trial. The amendments of the eleventh section of the Code in 1857, and 1862, allow an appeal in such a case, with no other limitation or restriction than that which is imposed in the case of an appeal from an order granting a new trial. The three cases above cited were not appeals from an order either granting or refusing a new trial; and, as I understand the decision of the Court of Appeals, it was simply, that that court will not review a judgment until it is actually entered, and is in all respects final in its character, which is something very different from hearing an appeal from an order granting or refusing a new trial.

It was held by the Court of Appeals (in *Lansing v. Russell*, 2 N. Y. 563), that the granting or refusing a new trial, in an equity case, where certain issues were directed to be tried by a jury, was a matter resting entirely in the discretion of the court below, and that no appeal would lie to the Court of Appeals in such a case. The merits of the controversy had not been disposed of when the appeal in this case was brought; and Chief Justice Bronson, in delivering the opinion of the court, said that whether the order refusing the new trial could be considered after there had been a decree upon the merits of the controversy, was a point that need not at that time be settled.

The Court of Appeals did, in an appeal after final judgment, review an order refusing a new trial in an equity case (in *Forrest v. Forrest*, 25 N. Y. 501), in which case they affirmed the judgment; but express authority is given to that court, upon an appeal from a judgment to review any intermediate order involving the merits, and this was such an order. All the judges in that case concurred in the opinion that where a trial by jury had been ordered in an equity case, it was to be reviewed not as upon a strict bill of exceptions, but upon the principles on which a court of equity examined the trial of a feigned issue, awarded for the information of its own conscience.

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Justice Wright, by whom the opinion of the court was delivered, declared that the application for a new trial was in the discretion of the equity judge; that it was not material whether evidence was improperly admitted or rejected; and that a court of equity was not bound to award a new trial unless the errors were so substantial as to lead to the conclusion that the trial had been an unfair one, or that injustice had been done; which was the rule upon which this court acted in refusing a new trial in the present case. Justice Wright, however, remarked further, that the discretion with which an equity court was clothed was not an arbitrary one, and that if the error committed plainly led to injurious and unjust effects, of which the defendant has a right to complain, and there was reasonable doubt of the justice of the result, a retrial of the issues should be ordered. This, I apprehend, applies where a court of equity gives judgment in accordance with the finding of the jury, regarding it as satisfactory, and treating it as conclusive upon the questions at issue; but, as was said by Chief Justice Bronson (in *Lansing v. Russell*, *supra*), and as had been held in other cases, the court may decree in accordance with the verdict, or it may disregard the finding of the jury, and decree the other way; that, in short, as Chief Justice Bronson said, "the jury and the verdict are things which the court may use or let alone as it sees good;" and the use which the court has made of the verdict does not come under review until an appeal is taken from its judgment.

In the present question the jury passed upon the real question at issue upon the pleadings, and the court has made a decree upon the merits, in accordance with their finding, so that it is an open question whether the defendant must wait until they appeal from the judgment before they can have a review in the Court of Appeals of the order refusing a new trial, or whether they can review it under the appeal allowed by the amendment of 1862. If it is reviewable only as an order involving the merits, upon an appeal after final judgment is entered, then the judgment may be practically carried into effect and executed before such an appeal can be brought. It is possible, therefore, that the Court of Appeals may conclude

that they can review the decision of the general term refusing to grant a new trial upon an appeal from the order, irrespective of the judgment, and as that is at least possible, the question is, whether we should stay all proceedings until the order can be reviewed by the Court of Appeals.

If nothing further were involved than the review of our order, and if the plaintiff could be secured against all the consequences of the delay, we should not hesitate to grant the application. If the suit involved nothing more than the recovery of a certain sum of money, a stay might be granted upon giving security for its ultimate payment. But the difficulty in the present case is, that the appeal, if it should be entertained by the Court of Appeals, cannot be heard, in its regular order, short of two or three years, and there is no means, at least none that occurs to Judge Brady or myself, with whom I have consulted, as the application was made in the first instance to him, by which the plaintiff could be secured from the consequences, if the property should in the mean time depreciate. It is a species of property, a proprietorship in a daily newspaper, which may be affected by a great variety of causes, for the pecuniary value of a newspaper depends upon its popularity and the amount of patronage it receives. The proportional part of the joint interest to which the plaintiff is entitled has been determined by the verdict of the jury, and by the decree which the court has made in accordance with it; but the value of the joint interest is not known, and cannot be known until the property has been disposed of by a public sale, and what the plaintiff will be entitled to will be his proportional part of the proceeds after the property has been sold. If it should diminish in value, his share will be proportionally diminished, and in property of this nature such a possibility is a matter which cannot be overlooked.

It has been settled by a course of judicial decisions that if, in an action for the dissolution of a copartnership, the parties cannot agree as to the value of their pecuniary interest, the only mode of determining it is by a sale of the whole of the partnership property at public auction, and this must take place sooner or later in this case, for the only point in dispute is the

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extent of the plaintiff's interest. It was held by Justice Hoffman, in *Dayton v. Wilkes* (17 How. Pr. 510), that the full protection of the property in a newspaper requires that the receiver should be empowered to carry it on until sufficient time is allowed to dispose of it advantageously; and Chancellor Walworth held in *Martin v. Van Schaick* (4 Paige, 480), that a court of equity will not take upon itself the responsibility of continuing the publication of a political newspaper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property; that if a receiver is appointed, he must proceed and sell the establishment without delay; that in the mean time the business must be carried on by him as usual, so that the good will of it may be secured to the purchaser, and the full value of it realized by the partner, on the sale.

We have gone much further than this by continuing the publication of the paper through the instrumentality of a receiver, during the litigation of this court, a period now of nearly three years and a half, and the reasons must be very grave ones which would warrant us in staying the sale now that the plaintiff has obtained a decree in his favor, the defendants having failed to establish any of the defenses which they had interposed. We refused a new trial, on the very ground upon which the Court of Appeals say (in *Forrest v. Forrest, supra*) a court of equity ought to refuse it, giving to the case a most careful consideration, and setting forth, in an elaborate opinion, the authorities and the reasons which, in the judgment of the majority of the court, were conclusive upon the point. We do not presume upon the infallibility of our own judgment. It is our duty to afford every reasonable facility to enable the defendants to review our judgment in a higher tribunal, when we can do so without prejudice to the rights of the other party; but no security which the defendants can offer, in the shape of the ordinary written undertaking, would guard against the result to the plaintiff of a diminution in the pecuniary value of the paper, during the long period which must elapse, before the appeal from the order refusing a new trial can be heard in the Court of Appeals. If we should stay the sale until the appeal is disposed of, the value of the plaintiff's interest would depend

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upon the value of the paper then, and we have no right by an arbitrary exercise of power to subject him to the chances of such a contingency. It is admitted in the pleadings that the plaintiff was a partner, and that the partnership was dissolved in the mode prescribed by the articles ; and such being the fact, he is entitled, upon the authority of adjudged cases, to have the joint property sold at the earliest period that it can be done advantageously, whatever may be the subsequent adjudication of the court upon the distribution of the proceeds.

We can see no way in which the plaintiff can be protected against the possibility of a diminution in the value of the property, unless the defendant should agree that his valuation of his interest upon the trial should be deducted from the proceeds, in the event of the orders of the general term being affirmed, and should be guaranteed by the giving of proper security. We do not impose any such condition, or say that the defendants ought to agree to it. All that we do say is, that we should not be justified in staying the sale any longer, unless the plaintiff can be secured in some way against the possibility of a diminution in the value of his interest ; and unless something of this kind can be suggested, a motion for a stay must be denied.

In the views above expressed, Judge BRADY concurs.

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JOHN S. MOON v. JOSIAH M. THOMPSON.

Although the Act of 1857 does not in terms require the justification of sureties to an undertaking required to remove a cause into the Common Pleas from a District Court, the undertaking is nevertheless subject to the approval of the justice, who may adopt any reasonable mode of satisfying himself of the sufficiency of the sureties offered.

Hence where, in an action in a District Court, the defendant submitted an undertaking to remove the cause into the Court of Common Pleas, and the justice required the defendant to produce his sureties for justification, and on examination one of them was rejected, as being insufficient, and the cause was adjourned, to enable the defendant to produce the other surety; *Held*, that a judgment rendered for the plaintiff, on the adjourned day, on the failure of the defendant or his surety to appear, was regular, and would be affirmed on appeal.

APPEAL from a judgment of the Sixth District Court.

The action was commenced by an attachment, and issue was joined on the 16th October, and the action adjourned to the 22d, on which day the defendant presented to the justice the usual undertaking (with affidavits of justification annexed), to remove the cause into the Court of Common Pleas. The justice declined to approve the same, and adjourned the action to the 23d, and afterward to the 24th October, to enable defendant to produce his sureties to justify. On the latter day, one of the sureties was produced, and having been sworn and examined by the justice, was rejected as insufficient. A further adjournment was granted, to enable the defendant to produce his other surety, and on the adjourned day, neither the defendant nor his surety appearing, an inquest was taken by the plaintiff, and judgment rendered in his favor, against the defendant. From such judgment defendant appeals.

Charles A. Magnes, for appellant.

R. H. Channing, for respondent.

BY THE COURT.—BRADY, J.—When the defendant desires to remove an action commenced in one of the District Courts

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to this court, it may be done "upon his executing to the plaintiff an undertaking, with one or more sureties, to be approved by the justice of the court in which such action is commenced, to pay to the plaintiff the amount of any judgment that may be awarded against him" by this court (section 3, Act of 1857; 1 Laws of 1857, p. 708). It will be observed that this law does not require in terms either an affidavit of justification, or a justification by examination before the justice. The undertaking, however, is to be approved by the justice, and as such approval calls for the exercise of a discretion, which may involve the whole of the plaintiff's recovery, there is no doubt that he would be authorized to adopt any reasonable mode of satisfying himself that the sureties offered were sufficient. The result of the course adopted by the justice in this case shows the propriety of employing some test, inasmuch as it appeared on the examination of one of the defendant's sureties that he did not possess the requisite qualifications. The justice was, however, authorized, if indeed he were not required, to demand the production of the sureties for personal examination by him. The rules and regulations of the Supreme Court of this State apply to these courts (Laws of 1863, ch. 424, p. 971), and by Rule 6 it is provided that whenever a justice or other officer approves of the security to be given in any case, it shall be his duty to require personal sureties to justify. The justification may be by affidavit, or by examination in open court. A justification of sureties is not, in its legal sense, accomplished in all cases by an affidavit merely. If the right to except exists, then the sureties must appear and submit to an examination as to their qualifications. The right to except to sureties is not given to the plaintiff in the proceeding under consideration, and the duty therefore of determining the sufficiency of the sureties devolves upon the justice. If the power was arbitrarily exercised, or employed in such mode as to defeat the application of the statute, the defendant would not be without relief, but the practice of requiring the sureties to appear and answer as to their ability is one which is not only not arbitrary, but calculated to subserve the ends of justice. The proceeding of removing causes from the District Courts to this

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court subjects the plaintiff to delay and additional expense. The defendant in this case was afforded all the opportunity to which he was entitled to prepare either a new bond, or for the trial, and has nothing to complain of, therefore, except that he was required to produce his sureties. That was not good cause of complaint, and the judgment should be affirmed.

CORNELIUS H. DE LAMATER v. RICHARD F. CAERMAN *and others.*

The several defendants separately appeared by different attorneys interposing answers setting up substantially the same defense, and on a judgment dismissing the complaint, separate bills of costs were taxed, and, on appeal from the judgment, the appeal was affirmed on one argument.

Held, That only one bill of costs of the appeal should be taxed. \

APPEAL from an order at special term affirming a decision of the clerk in adjusting costs of an appeal. This action was brought against the defendants, as the Trustees of the New York Brick Company, for having failed to file the statement required by the Act of 1848, § 12. A trial was had before a referee, upon whose report a judgment was entered dismissing the complaint. Separate bills of costs were taxed in favor of the several defendants who had appeared. The plaintiff appealed from the judgment, and on the appeal the judgment was affirmed, and each of the defendants, who had appeared, claimed to be entitled to a separate bill of costs on the appeal. The clerk, on adjustment of costs, allowed such separate bills, and, on appeal to the special term, the same was allowed, and the plaintiff appealed therefrom to the general term.

George W. Stevens, for appellant.

George Douglas and *W. B. Harrison*, for respondents.

BRADY, J.—In this case, the defendants appeared by different attorneys, and separate bills of costs were taxed in their

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favor, for which they had judgment. The plaintiff is the appellant. It was his duty to prepare the case and furnish it to the defendants' attorneys and the court. The answer of the defendants was substantially the same, and the judgment for all was given at the same time, as the result of one trial. The appeal was heard upon one argument, and it followed, from the nature of the judgment and the appeal, that there must be a judgment of reversal as to all or none. But one counsel was necessary, therefore, and one set of points. For these reasons, but one bill of costs of the appeal should be taxed, unless the general term ordered otherwise, which was not done. The fact that the defendants had separate bills of costs up to the appeal, is a strong reason why there should not be separate bills allowed upon the appeal. I have not been able to find any precedent for such an allowance, and, it seems to me, to be unreasonable. The order at special term should be reversed.

CARDOZO, J.—I agree that the order in this case should be reversed, for the reason that the questions, upon which the decision of the appeal from the judgment depended, were the same as respects each of the defendants; and, therefore, it was not necessary for all the defendants to print points or prepare for argument.

DALY, F. J., concurred.

Order reversed.

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DENNIS HOGAN v. CHARLES DEVLIN.

Where, in an action in a District Court in the city of New York, a defendant presents an undertaking to the justice, pursuant to chap. 344, sec. 3, Laws of 1857, for the purpose of removing the cause to the Court of Common Pleas, the jurisdiction of the justice in the cause, except to adjourn, is arrested, until he has disposed of the new element thus introduced.

Where a justice, after the filing of such an undertaking, and before its approval or disapproval by him, entertained a motion by the plaintiff to reduce the amount of his claim, and thus, on the proof adduced, gave a judgment for the plaintiff:

Held, That such judgment was erroneous, and will be reversed on appeal.

The execution of a power conferred by statute upon a public officer, concerning the rights of third persons, may be insisted upon as a duty, although the phraseology of the statute be permissive, and not peremptory.

APPEAL by the defendant from a judgment of the Seventh District Court. The action was brought to recover \$147, to which the defendant interposed a defense, and presented to the justice an undertaking, and a draft of an order to remove the cause to the Court of Common Pleas, pursuant to the provisions of sec. 3, chap. 344, Laws of 1857, p. 707. The justice retained the papers, without either approving or disapproving of the same. The next day the case was called, the defendant's counsel was absent, but a lad stated that the undertaking had been left with the court. The justice then announced that he had received the papers, but had not examined them. The plaintiff's counsel immediately moved to reduce the claim of the plaintiff to \$99, which motion was granted by the justice. Shortly thereafter the cause was called, and the plaintiff allowed to prove his case, and obtained judgment for \$97.50 damages, besides costs.

From this judgment defendant appeals.

Wm. H. Ingersoll, for appellant.

S. B. Noble, for respondent.

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BY THE COURT.—BRADY, J.—The defendant, desiring to remove this action to this court, caused to be prepared and executed the prescribed undertaking, which was presented to the justice for his approval, on the day prior to that to which the action had been adjourned. He accepted and retained it, but did not examine it at the time he received it. On the following day, when the cause was called, the plaintiff moved to amend, by decreasing the amount claimed to less than \$100, and the justice, without approving or disapproving the undertaking, and disregarding it, allowed the amendment, and refused to grant an adjournment. The defendant was not present, and it seems, from the circumstances disclosed by the return, relied upon the cause being removed. The plaintiff took judgment. It must be reversed. The defendant having complied with the statute, and initiated the proceeding which it authorized, the justice was bound to act in reference to it. He had the power to disapprove the undertaking in the exercise of a sound discretion, and, if he had done so, the judgment would doubtless be sustained, inasmuch as the defendant, without having procured the approval of the undertaking when presented, should have attended upon the day to which the action had been adjourned, prepared for any emergency that might have arisen. The error of the justice consists, however, in his omission to discharge the duty which the statute imposes (Act of 1857, Laws, vol. 1, p. 707, sec. 3). By neglecting to act in the proceeding commenced, he disregarded a right secured to the defendant, and of which he could not be deprived in that way. In the case of the *Mayor v. Furze* (3 Hill, 615), it was held, upon a consideration of cases bearing upon the subject, that where a public body or officer has been clothed with power to do an act which concerns the public interest, or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive, and not peremptory. The rule thus stated applies to this case. The execution of the power conferred upon the justice may be insisted upon as a duty. It was not waived by the defendant, and the justice was bound to perform it. If he had approved the bond, the cause would have been removed, and his jurisdic-

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tion at an end. When an undertaking, such as that presented to the justice in this case, is prepared and delivered for approval, the power of the justice in the case ceases until he disposes of the new element thus introduced. He may be authorized to adjourn the action for the purpose of informing himself of the sufficiency of the sureties, but this would be the limit of his power. The undertaking is designed to destroy his jurisdiction, and it arrests it for the time being, and, indeed, until he has approved the undertaking, or refused to do so. There are no reasons why this should not be the rule to govern his conduct under such circumstances, as long as the right to remove the action exists. Whether the amendment which the justice allowed, was one which could have been made to prevent the removal of the action, it is not necessary to consider. It is enough for the purpose of this appeal, that the justice failed to discharge a duty obligatory upon him, before he entertained the motion to amend (see *Tompkins v. Sands*, 8 Wend. 462).

Judgment reversed.

JOSEPHINE WEBSTER v. AUGUST L. NOSSER.

An action for the breach of a covenant, upon the part of a lessee, that he will make repairs during the term of the lease; or upon a covenant that he will not make alterations in the leased premises, without the consent of the lessor, may be maintained by the lessor without awaiting the expiration of the term of the lease.

APPEAL from a judgment of the District Court for the Sixth District.

The action was brought to recover damages for a breach of covenant, contained in a lease, entered into by the defendant with the plaintiff. The justice before whom the cause was tried dismissed the complaint, and from his judgment the plaintiff appealed. The facts fully appear in the opinion of the court.

Roswell D. Hatch, for appellant.

Townsend & Levinger, for respondent.

BY THE COURT.—BRADY, J.—The defendant covenanted to do and make all repairs during the term of the lease between him and the plaintiff, and to quit and surrender the premises at the expiration of the term in as good state and condition as they were at the commencement. He also covenanted that he would not make any alterations on the premises without the consent in writing of the lessor, under the penalty of forfeiture and damages.

This action was brought to recover damages sustained by a violation of both these covenants, viz: for a failure to make repairs and for alterations made without the consent of the plaintiff. On the trial the plaintiff proposed to show that the defendant should have made repairs, and "admitted that the lease had two years to run." The defendant objected; and the justice held that the plaintiff might show that the tenant had violated the covenant, so far as not making repairs which were essential to prevent the freehold from falling into decay. The plaintiff was permitted, however, to give evidence upon the subject of alterations; but when the plaintiff rested, the defendant's counsel moved to dismiss the complaint, on the grounds: 1. That the term was unexpired; and, 2. That there was no evidence showing irreparable damage to the building, or any waste, or any deterioration in the value of the premises, in consequence of the alteration proved to have been made, or proper evidence of the amount of damages, if any there were. The complaint was, upon this motion, dismissed, and the plaintiff's case failed in both causes of action.

The justice seems to have been of the opinion that the plaintiff could not recover for repairs, because the defendant's term was unexpired, and such repairs were not essential to prevent the freehold from falling into decay, and that for some reason, but what does not clearly appear, the plaintiff was not entitled to recover, although alterations had been made without his consent.

In both of these views he was in error.

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It has been determined in this State that an action on a covenant similar to that of the defendant to repair, could be maintained during the term (*Schiefflin v. Carpenter*, 15 Wend. 400, and cases cited). Chief Justice Holt, in the case of *Vivian v. Campion*, 1 Salk. Rep. 139, 2 Ld. Ray, 1125, said: that the jury should give as much damages as it would cost to put the premises in repair, but none in respect to the length of time they continued in decay; that it was not a hard action; that good damages were always given in such cases, because the damages ought to be applied to the repair of the premises. In this suggestion we have the reason of the rule. The lessee is required to perform his covenant, when it is broken, by paying to the lessor in damages a sum sufficient to make the repairs which are necessary, and which should have been expended by him, and nothing more. (See *Shortridge v. Lamphigh*, 2 Ld. Ray. 798; 7 Mod. 71). It would seem to follow, as the award is in its nature a decree for a specific performance, that the sum given would, on a proper application in equity, be appropriated to the performance of the repairs, so that the lessee might have the benefit of such application during the balance of his term.

A violation of the covenant not to make alterations is also attended with consequences of immediate liability. The covenant being broken, the rule is universal that a right of action at once accrues, unless there is something in the agreement, of which it is a part only, to the contrary. Such is not the case here. On the contrary, the covenant provides that alterations shall not be made, under penalties of forfeiture and damages. In the case of *Vickery v. Jackson* (2 Starkie Rep. 260), which was an action of ejectment on forfeiture for breach of covenant, it appeared that the lease contained a covenant to repair within three months after notice, and also a general covenant to repair. The evidence of dilapidation principally relied on was, that the defendant had broken a doorway through the wall of the demised house into the adjoining house. It was contended, on the part of the defendant, that the breach had been waived by acceptance of rent after notice given, and it was said on his behalf that it always had been his intention to rebuild the wall before the end of his term; but Lord Ellenborough held that

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this was a continuing breach and a want of repair which amounted to a forfeiture. The removal of the partition described by the witnesses in this case was an alteration of the premises, if it were not a violation of the covenant to repair. Whether the premises were injured by the alteration, was a question of fact which the justice did not consider, it would seem, having dismissed the complaint because the action was brought during the term. If such be not the case, the judgment was erroneous, inasmuch as the evidence given entitled the plaintiff clearly to damages. The covenant was broken, and it was shown that it would cost, as shown, about \$200 to restore the partition removed.

The judgment must be reversed.

JOSEPH T. HARRIS v. DANIEL BURTNETT.

The plaintiff, a broker, was employed by the defendant to effect a sale of land, and to that end the plaintiff introduced to the defendant one R., who proposed to take the land in part payment of other land he wished to sell. The offer was rejected, but nearly two years afterward, the defendant sold the land to R.'s wife, through R.'s agency: *Held*, that the plaintiff was not entitled to recover broker's commission for effecting such sale.

A broker, employed to effect the sale of land, who makes an agreement with a purchaser, introduced by him, that in case of the latter's offer of an exchange being accepted, he, the broker, shall be paid a gratuity, cannot recover a broker's commission from his first employer in case the offer of exchange is accepted. (Per BRADY, J.)

APPEAL by the plaintiff from a judgment of nonsuit, entered at trial term.

This action was brought for commissions due the plaintiff for services as a broker.

The defendant, owning a country place in Westchester county, employed the plaintiff, during the winter of 1863, to

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sell the same, and promised to pay him his commissions. The plaintiff found Russell, who had a Colorado mine for sale, and who was willing to take the place in part payment for the same. The defendant rejected the proposition, and nothing further was done by the plaintiff. A year or more afterward Mr. Russell, having become intimate with the defendant, visited the latter at his country place, and was so pleased with it, that in February, 1865, he bought it as the agent of his wife. There was an understanding, when the plaintiff introduced Mr. Russell, that if the defendant purchased the Colorado mine, the plaintiff was to have an interest.

These facts appearing, the court nonsuited the plaintiff, and dismissed the complaint.

The plaintiff appealed to the General Term.

Francis Byrne, for appellant.

H. P. Allen, for respondent.

BY THE COURT.—BRADY, J.—The plaintiff was employed by the defendant to sell a country place. He found Mr. Russell, who was willing to take it in part payment for a Colorado mine, which he was desirous to sell. When the proposition was made to the defendant he rejected it. Nothing more was done by the plaintiff to bring the parties together in reference to the defendant's property. Mr. Russell became intimate with the defendant, and a year or a year and a half after the negotiation mentioned fell through, the defendant invited him to go to his place in the country. He was impressed with the beauty of the place, and bought it as the agent of his wife. It also appears that when the plaintiff introduced Mr. Russell it was understood between them, that if the defendant purchased the Colorado property, the plaintiff was to have an interest, and thus the success of the double enterprise would have been attended with a double benefit to the plaintiff. He would have obtained his commission from the defendant for selling his land, and from the plaintiff compensation for the sale of the Colorado property. Such transactions are not toler-

ated. A broker cannot, under such circumstances, serve both employers with fidelity. This is too obvious a proposition to require more than its statement. Independently of that, however, it appears that the plaintiff did not find in Mr. Russell a purchaser. Mr. Russell did not go to the defendant to purchase the property to which the plaintiff called his attention. He went with the intention of taking it in part payment for something which he wished to sell, and failed to accomplish the sale. He was not, therefore, a purchaser, within the meaning of that designation between broker and seller, and never, in fact, became one. His wife became the grantee of the premises. It is not necessary, however, to place the decision of this case upon that ground, or upon the ground that the plaintiff cannot recover because he made a double arrangement. The plaintiff has not shown that he effected a sale of the premises. He introduced Mr. Russell with a full knowledge of the manner in which he designed to acquire the property, and the sale was not accomplished. He did nothing to induce Mr. Russell to change his views. He doubtless thought it useless; and it is established that his views were not changed until more than a year after his proposition to the defendant had been rejected, and they had separated. The sale arose from the intimacy which resulted from the meeting on that occasion, it is true, but not until more than a year afterward, during which time Mr. Russell and the defendant became intimate socially, and in a business point of view. When these relations existed, the defendant invited him to his house in the country, and introduced the subject of a sale of the place, and it resulted in a purchase by Mr. Russell's wife. The introduction is altogether too remote to warrant any claim by the plaintiff; more especially when it appears, as in this case, that the original design of the purchaser was not to pay money, but to exchange property. The plaintiff did not do any thing to alter that determination on the part of Mr. Russell, and did not, therefore, earn his commissions.

The judgment should be affirmed.

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FRANCIS FARLEY v. WILLIAM DE WATERS.

A statute, which, in general terms, gives a court jurisdiction and cognizance of a certain class of actions, except as to the amount of damages which may be claimed, must be regarded as repealing, by implication, a previous statute, by which the court could exercise only a qualified jurisdiction in such actions.

The act of 1848 (Laws of 1848, p. 497, sec. 58), conferring upon the Marine Court jurisdiction in actions for assault and battery, by or against any person on board a vessel in the merchant service, on the high seas, or in a place without the United States, &c., was, by implication, repealed by the act of 1853 (Laws of 1853, p. 1165), which conferred jurisdiction upon that court in all actions for assault and battery, &c., with a limitation only of the amount of damages recoverable.

Hence, the Marine Court has jurisdiction of an action for an assault and battery committed on board a vessel in the merchant service, although not upon the high seas, and not without the United States.

APPEAL by the defendant from a judgment of the Marine Court, at general term.

The action was between two citizens of the State of New York, and was brought to recover damages for an assault committed by the defendant, on board the vessel R. B. Schmidt, of which he was captain, while said vessel was at Light House Inlet, near Charleston, State of South Carolina.

At the conclusion of the testimony, the defendant's counsel moved for judgment, by reason of the want of jurisdiction in the court. The motion was denied, and judgment rendered for the plaintiff, which, being affirmed by the general term of the Marine Court, the defendant appealed to this court.

Christie & Fairbanks, for appellant.

Charles Fraser, for respondent.

BRADY, J.—The act to simplify and abridge the practice, pleadings, and proceedings of the courts of this State, passed April 12, 1848 (Laws 1848, p. 497, § 58), declared that the Marine

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Court, of the city of New York, should have jurisdiction in the cases specifically designated, and no other. It conferred jurisdiction in actions by or against any person belonging to, or on board of, a vessel in the merchant service, for an assault and battery, or false imprisonment, committed on board such vessel, upon the high seas, or in a place without the United States, of which the ordinary courts of law of this State had jurisdiction, though the damages exceeded one hundred dollars. The jurisdiction was, therefore, limited to assaults and batteries and false imprisonment, committed on board of a vessel, by a person belonging to, or on board of, such vessel. The section referred to was not changed by the amendments to the Code of 1852 (Laws 1852, p. 651); but, by an act passed in the session of that year (Laws, p. 647, sec. 9), the jurisdiction was extended to two hundred and fifty dollars, in all cases in which it was then limited to one hundred dollars. By the act in relation to the Marine Court, of the city of New York, passed July 21, 1853 (Laws, p. 1165), it is provided that the Marine Court, of the city of New York, shall have jurisdiction over, and cognizance of, actions of assault and battery, false imprisonment, malicious prosecution, libel, and slander, where the damages claimed do not exceed five hundred dollars, and that the costs, in all such actions, when prosecuted in any other court in the city of New York, should be limited to the amount which would have been recovered in said Marine Court, if prosecuted therein, but in no such action should the costs exceed the damages recovered. The same act provided for an appeal to the general term of the Marine Court, which the justices were empowered to hold. It is manifest that the legislature intended to enlarge the jurisdiction of the Marine Court, in actions of assault and battery, whether committed on board a vessel on the high seas, or otherwise. The limited jurisdiction of that court was merged in the larger and more general jurisdiction given by the act of 1853. The legislature not only gave a general jurisdiction of actions of assault and battery, but in actions of slander, malicious prosecution, and libel, of which that court had no previous jurisdiction. Such was not only the intention, but it was designed to relieve the other courts having cognizance of such actions,

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where the damages claimed did not exceed five hundred dollars, by limiting the costs to be awarded in such actions to the sum which could be recovered as costs in the Marine Court. If the construction adopted by Judge Cardozo be correct, then, for an assault and battery committed on board a vessel lying at the port of New York, the Marine Court can give no redress to the injured person. I think such is not the law, either in terms, spirit, or intention. The statute of 1853 is sufficiently comprehensive to include all actions of assault and battery of which the ordinary courts had jurisdiction, provided only, however, that the damages claimed do not exceed five hundred dollars. The act of 1853 necessarily repeals the act of 1848, inasmuch as by the latter act the Marine Court had jurisdiction only of cases where the assault and battery was committed on board a vessel on the high seas, or without the United States, and, by the former act, the jurisdiction of those actions is conferred without any condition or limit, except as to the amount of damages. So far, therefore, as the act of 1848 limits the action to the conditions therein expressed, it is repealed, and, being thus repealed, as it is not in conflict with the act of 1853, and not necessary to perpetuate its object when passed, or to make the latter effective, it must be regarded as repealed for all purposes. I think the judgment should be affirmed, agreeing, as I do, with Judge Cardozo, in the other conclusions to which he has arrived.

DALY, F. J.—Before the passage of the act of July 21, 1853, the jurisdiction of the Marine Court, in actions of assault and battery, was limited to a certain class of cases; but that act declares that the court shall have jurisdiction over and cognizance of actions of assault and battery, false imprisonment, malicious prosecution, libel, and slander—jurisdiction in the three last actions, malicious prosecution, libel, and slander, being by that act conferred upon the court for the first time. The only limitation to the jurisdiction thus generally conferred in the five actions named is, that the damages claimed should not exceed five hundred dollars; and that it was the design of the legislature, that the court should have unlimited jurisdiction

in such actions when the damages claimed did not exceed five hundred dollars, is apparent from the subsequent provision, that the costs in all such actions, if prosecuted in any other court in this city, shall be limited to the amount which would have been recovered in the Marine Court, if the action had been prosecuted therein; and that in no such action should the costs exceed the damages recovered. The plain object of this latter provision in respect to costs, is to take away any inducement to bring such actions in the higher courts in this city, except where the plaintiff expects to recover a larger amount of damages than five hundred dollars; for if the recovery is less than that amount, he gets only such costs as are allowed in the Marine Court, and in no event can the costs exceed in amount the damages recovered.

An act which, in general terms, gives a court jurisdiction and cognizance of actions of assault and battery, and false imprisonment, with no limitation except as to the amount of damages which may be claimed, must be regarded as repealing, by implication, a previous enactment by which it could exercise only a qualified jurisdiction in such actions. By the subsequent act, that which was before limited is made general, or rather limited only to the extent expressed in the subsequent enactment.

The case to which Judge Cardozo refers, the original report of which is in Dyer, 131 b, is in no way in conflict with this view of the effect of the subsequent statute. To understand the precise bearing of that decision, it is necessary to look at the original report as well as into the other *Doctor Foster's Case* (in the 11 of Coke, 63), where the reason for the decision is given, and to examine the three statutes, 33 H. 8, c. 23; 35 H. 8, c. 2; and 1 & 2 of Philip & Mary, c. 10, which came under consideration in the decision.

Before the passage of the 33 of H. 8, c. 23, persons guilty of treason had, by the common law, to be indicted within the shire or place where they committed the offense, and to be tried by the inhabitants or freeholders of that place, which appears by the preamble of the statute itself (1 Rastell's Statutes, 757); and that statute was passed, where the treason was confessed,

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upon examination before any three of the king's council, or when any three of the council should "vehemently suspect" that the offense had been committed, to empower the crown to issue a commission under the great seal, for the trial of the accused before commissioners in any shire or place which the king might appoint. The statute of 1 Philip & Mary, c. 10, declared that all trials for treason should be according to the course of the common law, and Coke declares that this, by implication, repealed the former statute. The statute of 35 H. 8, c. 2, was passed to empower the judges of the Court of King's Bench, or a special commission, to try cases of treason committed out of the realm of England, the same as if the offense had been committed therein—the preamble of the act reciting that it was doubted whether, by the common law, certain kinds of treason, misprisions, and concealments of treason, perpetrated out of the realm of England, could be inquired of or tried therein (1 *Rastell*, 839); and it was held, in the anonymous case in *Dyer*, the treason having been committed in France, that this statute was not repealed by the 1 of Philip & Mary, c. 10, declaring that treasons thereafter should be tried according to the course of the common law, because treason committed out of the realm of England was not, according to the course of the common law, an offense triable in England, for treason, by the common law, had to be tried in the county or shire where the offense was committed. The right to try a man in England for treason committed beyond the sea, was derived solely from the statute of 35 H. 8, c. 2, which provided for the place, for the tribunal, and for the manner in which such an offense should be tried, and which could not be repealed by a statute providing for the trial of treason thereafter according to the course of the common law—the offense for which the previous statute had made provision being one unknown to the common law, and consequently one which could not be tried according to the course of it (*Dyer*, 131 b; *Doctor Foster's Case*, 11 Co. 63; *Staunforde's Pleas of the Crown*, 89, 90; *Hale P. C.* part 1, c. 25). This exposition of the case in *Dyer* shows that it has no bearing upon the point under consideration. I agree with Judge Brady, that the judgment should be affirmed.

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CARDOZO, J. (dissenting).—The case of *Moloney v. Dows* (8 Abb. P. R. p. 316) seems to be misunderstood. It is sometimes cited as an authority that the courts of this State have no jurisdiction over actions for trespass to personal property. It was shown in *Smith v. Butler* (1 Daly, 508) to have no such effect. It is now relied on as establishing, that an action cannot be here maintained between residents of this State for an assault and battery committed in a foreign country. This is also a misapprehension. Giving that decision its fullest effect, it simply holds that the courts of this State will not take cognizance of an action between two citizens of another State, for a tort committed by one on the person of the other in the State within which both of them resided when the wrong was perpetrated. That case, therefore, has not the slightest application to the present, in which it appears that though the wrong was committed out of this State, both parties were and are residents of it. If this were the only question arising here, I should think the judgment right. But it is claimed, that the Marine Court had not jurisdiction of the subject matter of the action because the Code (section 68, original [Code of 1848] § 58), which is substantially, in this respect, a re-enactment of the act of 1813 (2 R. L. 1813, p. 381, § 106) gives (sub. 4) to the Marine Court jurisdiction of actions for assault and battery only when brought by or against a person belonging to, or on board of, a vessel in the merchant service, and when the wrong was committed on board of such a vessel upon the high seas, or in a place without the United States. It is conceded that the assault and battery complained of, was not committed on the high seas, nor in a place without the United States. Both plaintiff and defendant swear that, when the acts complained of were done, the vessel was lying ashore at Light House Inlet, in the State of South Carolina. The assault and battery, therefore, was not committed on the high seas, nor at a place without the United States, but, on the contrary, occurred in the State of South Carolina, within the United States. The plaintiff, in reply to this objection, relies upon the statute of 1853 (Session Laws of 1853, p. 1165), by which it is provided (§ 1), that "the Marine Court of the city of New York shall have

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jurisdiction over, and cognizance of, actions of assault and battery, false imprisonment, malicious prosecution, libel, and slander, where the damages claimed do not exceed five hundred dollars ;” and it is insisted that this provision is inconsistent with the previous statutes, to which I have referred, and that, therefore, there is no longer any restriction upon the jurisdiction of the Marine Court (except as to amount) in actions of this description. The question is, whether the provisions of the Code are in conflict with the statute of 1853, and, therefore, to be deemed repealed. I think not. The provision referred to, and which was in existence when the act of 1853 was passed, is not mentioned in, and expressly repealed by, the latter statute, and it will, therefore, be our duty to declare it to be still in force, unless there is such a manifest incongruity between it and the subsequent legislation, as makes it impossible that the two should coexist.

This rule is well settled (see *People v. Deming*, 1 Hilt. 271).

In Sedgwick on Statutory and Constitutional Law, it is laid down (p. 123), that, “ when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that it shall have any meaning at all ;” and *Forster's Case* (11 Rep. 63), is cited, in which it was said, that the statute of 1 & 2 Philip & Mary, c. 10, declaring that all trials for treason should be according to the course of the common law, and *not otherwise*, did not work a repeal of the statute of 35 Henry VIII. c. 2, which authorized trials for treason beyond the sea. In other words, that legislation for a special class of cases is not necessarily repealed by subsequent statutes of a general character, not inconsistent with the prior more pointed ones. Now it is clear that the act of 1853, may have meaning and effect without reading it as removing the limitation I have mentioned. The act of 1813 and the Code denied jurisdiction to the Marine Court in actions of this character, except when brought by or

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against a person belonging to, or on board of, a vessel in the merchant service, and for a wrong committed on the high seas, or without the United States. So that, as the law stood before 1853, the Marine Court had no jurisdiction of an action for an assault and battery if committed in this State. It may very well be, that the legislature, dealing with the general jurisdiction of the court upon the subject of actions for assault and battery, and the like, thought it wise to extend it as a general rule, and as to persons generally, while it did not design or think it wise to do so as respects a certain specified class of persons.

The previous legislation regulated the jurisdiction of the court when actions of this nature were brought "by or against a person belonging to, or on board of, a vessel in the merchant service."

The new jurisdiction, conferred in general language, has a large field to work upon. It takes in all actions of this character *not* brought by or against a person belonging to, or on board of, a vessel in the merchant service, and I am, therefore, of opinion that the general words do not remove the limitation of jurisdiction as to the one class of persons which is created by the previous more special and pointed statutes.

Both acts may stand without any inconsistency. Together their effect is that; as a general rule, the Marine Court has jurisdiction of this class of cases, but when the action is brought by or against a person belonging to, or on board of, a vessel in the merchant service, it is deprived of jurisdiction, unless the cause of action arose either on the high seas, or without the United States.

In other words, one act is general in its character, and the other affects special cases.

There is no incongruity in such legislation. This construction gives force and vitality to both statutes, and is not inconsistent with either. It follows that, as this action was brought by a person within the class specially legislated about, and that the cause of action did not arise either on the high seas, or without the United States, the court below had no jurisdiction, and the judgment should be reversed.

Judgment affirmed.

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MOSES KROHN v. DANIEL SWEENEY.

A public house, which the proprietor designates as a "hotel," and at which guests are provided with lodgings for uncertain periods, and under no express agreement, and which only differs from ordinary hotels in having a refectory on the premises, where guests are at liberty to take their meals, if they wish, and pay for them, then and there: *Held*, To be an inn, and the proprietor an innkeeper, with all the responsibilities attaching to such character, as respects guests received and accommodated with lodgings.

An innkeeper is not relieved from his common law liability, for the loss of his guest's watch and traveling money, by the fact that he has complied with the provisions of the statute of 1855, by providing a safe, and posting notice, as required by that statute (following *Gile v. Libby*, 36 Barb. 70).

APPEAL by the defendant from a judgment of the general term of the Marine Court.

The action was brought to recover the value of a watch, and a sum of money (\$50), stolen from the plaintiff's room, while a guest at defendant's house, known as Sweeney's Hotel.

The defendant denied his liability as an innkeeper. It appeared in evidence that he kept a public house, at No. 68 Chatham street, New York, upon what is called the European plan. There was in the basement of the building a refectory, or dining room, kept by the defendant, in which meals were served at all hours of the day and evening, and, those guests who took their meals there, paid at once for what they ordered, but, for their lodging and other charges, they paid at the office of the hotel when they took their departure.

The defendant had provided a safe for the deposit of articles of value, &c., and had posted notices in the various rooms, as required by the statute of 1855, chap. 421, to regulate the liability of hotel keepers, &c.

The defendant's counsel moved to dismiss the complaint, on the ground that the defendant was not a hotel or innkeeper, but a lodging-house keeper, and, therefore, not responsible to the plaintiff for the alleged loss, and on the further ground, that,

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even if a hotel keeper, he was not liable to the plaintiff for, but was exempt by statute from, the alleged loss of the property claimed, because the plaintiff had not deposited the same with the defendant for safe keeping.

The judge denied the motion, and the defendant excepted.

The jury rendered a verdict for the plaintiff.

Francis Byrne, for the appellant.

I. The appellant received the respondent as a *lodger*, and no agreement (express or implied) was made by the appellant to entertain the respondent otherwise. The charges for lodgings were made at the office, and meals were paid for at the refectory.

II. The appellant was a *lodging-house* keeper, and not an *innkeeper*, which is a distinct occupation (*Calye's Case*, 8 Coke R. 32; *James v. Osborn*, 2 Chitty's R. 484; *Doe ex dem.*, *Pitt v. Laming*, 4 Camp. R. 77; *Parkhurst v. Foster*, 1 Salkeld, 387; *Thompson v. Lacey*, 3 Barn. & Ald. 283; *Dansy v. Richardson*, 25 E. Law & Eq. R. 76; 1 Bell's Commentaries [5th ed.], 469).

III. If the appellant were an *innkeeper*, he had a right, by common law, "to require that the property of his guest be delivered into his hands, in order that it may be put into a secure place, and, if the traveler refuse, the innkeeper is not responsible for its safety" (*Calye's Case*, supra; and see Holt's N. P. 211). And the respondent not having done so, assumed the responsibility of loss, and cannot charge the appellant with it.

IV. The appellant complied with the provisions of the statute (Laws of 1855, chap. 421) concerning innkeepers, of which the respondent had notice in the book of arrivals, and agreed to the condition therein expressed at the top of the page.

Kaufmann, Frank & Wilcoxson, for the respondent.

BY THE COURT.—CARDOZO, J.—The plaintiff claimed to recover the value of a gold watch, and about \$50 cash, which

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had been stolen from him at night, during his stay at the defendant's premises, in this city. The defendant denies any liability. He claims that he is not an innkeeper, and that his house is not an inn. I think that is an error. He is the proprietor of the premises Nos. 64, 66, and 68 Chatham street, which he designates "Sweeney's Hotel," and its only variation from ordinary hotels is, that on part of the same premises he keeps a refectory, at which his guests take their meals, if they please, paying for them then and there. His house is open to all persons, and he receives them without any express agreement. Travelers go to his premises, and find the ordinary appearances and arrangements of a hotel; they register their names on a book of arrivals, as in hotels generally, and are assigned rooms, which they occupy, with their baggage, as long as they choose to remain. Although no written opinion was prepared, the point has been distinctly ruled, in the general term of this court, that, under such circumstances, the defendant is an innkeeper, and his premises an inn (*Barnard v. French*, Gen. T. Com. Pleas, June, 1864). It may very well be that the defendant occupies a twofold character, namely, that of a mere restaurant keeper, so far as relates to persons resorting to his refectory only, for the purpose of taking their meals, while he is an innkeeper, with all the responsibilities attaching to such as respects travelers, who, like the plaintiff, are received by the defendant and accommodated as guests with lodging, in that portion of the building arranged as lodging places, for an uncertain period, and under no express engagement (see *Carpenter v. Taylor*, 1 Hilt. 193; *Willard v. Reinhardt*, 2 E. D. Smith, 148; *Wintermute v. Clarke*, 5 Sand. 243). But at present, it is enough to say, that on the point involved in this case, the liability of the defendant as an innkeeper must be considered as settled by the general term decision in *Barnard v. French* (supra).

The loss of the plaintiff's property occurred by theft, committed at night, in the sleeping room which had been assigned to him; and the defendant, upon the theory of his being an innkeeper, insists that he is released from responsibility, because he had complied with the act of 1855, by providing a safe and

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posting notice, as required by that statute. The property lost was the plaintiff's watch, and a small sum—about \$50—of money. The questions arising on this branch of the case were fully considered in *Gile v. Libby* (36 Barb. 70), and a just and reasonable view of the law was there taken, which, I think, upon the finding of the jury, disposes of this case against the defense set up. The judge before whom this case was tried, ruled correctly on the motion to dismiss the complaint, and in his refusals to charge as requested by the defendant's counsel, and submitted the case to the jury with proper instructions, under which they have found a verdict for the plaintiff which cannot be disturbed (see, also, *Stanton v. Leland*, 4 E. D. Smith, 88).

The judgment should be affirmed, with costs.

GEORGE BOWMAN v. FREDERICK DE PEYSTER.

An order, allowing a defendant to amend his answer by setting up an additional defense, does not affect any substantial right of the plaintiff, within the meaning of subd. 3, of sec. 849, of the Code of Procedure, and is not, therefore, appealable (overruling *Harrington v. Slade*, 22 Barb. 161; and *Sheldon v. Adams*, 27 How. Pr. 179).

If a defendant has, from a misconception of his rights, want of knowledge, or other excusable cause, omitted to avail himself of a defense, it is always in furtherance of justice to permit him to set it up upon proper terms, if the application is made in good faith, and the allowing of it will work no injustice to the plaintiff.

Where the proposed new defense appears available, and its introduction imposes no hardship upon the plaintiff, nor involves an abandonment of the old defense, but, on the contrary, is consistent with, and, in fact, grows out of such defense, calling simply for proof, on the part of the defendant, of record proceedings which plaintiff cannot deny: *Held*, That such amendment was properly allowed, even upon the trial.

APPEAL by the plaintiff, from an order of the special term, allowing the defendant to amend his answer on terms.

Bowman v. De Peyster.

This action was commenced the 10th October, 1859, to recover an alleged balance owing for professional services, rendered by the plaintiff in conducting a suit, in the Supreme Court, for De Peyster & Wilmarth agst. the Sun Mutual Insurance Company. The defendant is the assignee of the firm of De Peyster & Wilmarth.

The defendant's answer alleged payment to the plaintiff to the full value of his services, and denied any balance owing. The cause was referred, by consent, to George N. Titus, Esq., on February 12, 1861. On the trial before the referee, the plaintiff produced a certain petition, made to the Supreme Court, by Frederick De Peyster, to compel George Bowman to pay over the amount collected in the case against the Sun Insurance Company. On that petition, a reference was had to report what amount was due to Bowman. The referee awarded him (with previous payments) about \$4,500, and ordered the balance to be paid to Mr. De Peyster. The order provided that such payment should be without prejudice to Bowman's right to commence an action for his costs. These proceedings the defendant offered in evidence. The plaintiff, among other objections, urged that they were not set up in the answer. The referee held, that they could not be given in evidence without being pleaded.

The defendant then moved to amend his answer, by setting up these proceedings as a bar, and also as evidence of the value of Bowman's services. The referee held, that he had no power to make this amendment, as he was controlled by certain decisions, especially by that in *Woodruff v. Hurson* (32 Barb. 557), but granted a stay of proceedings, to enable the defendant to move at special term. On the hearing of the motion, at special term, the following decision was rendered :

BRADY, J.—I think the motion to amend should be granted. If the plaintiff, in consequence of the defense set up by the amendment, is obliged to abandon his claim, the defendant must pay the costs of the action up to this time. If not, the amendments will be allowed on *ex debito justitiae*, on payment of \$10, costs of the motion.

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From this decision, the plaintiff appealed to the general term.

George Bowman, for appellant, on the point that the order was appealable, cited *Allaben v. Wakeman* (10 Abbott Pr. 163); *Union Bank v. Mott* (11 Id. 46); *Perry v. Moore* (2 E. D. Smith, 32). On the point that the defendant was estopped from applying for the order appealed from, he cited *Martin v. Angell* (7 Barb. 407).

John Sherwood, for respondent, contended that the order was not appealable, and cited *Travis v. Barger* (24 Barb. 614); *Hodges v. Tennessee Fire & Marine Ins. Co.* (8 N. Y. 418); *McQueen v. Babcock* (13 Abbott Pr. 268); *Saltus v. Genin* (19 How. Pr. 233); *Hatfield v. Secor* (1 Hilton, 535); *McCarty v. Edwards* (24 How. Pr. 236).

BY THE COURT.—DALY, F. J.—If the question were now to be passed upon for the first time, I should hold that an order of the judge, at special term, allowing a defendant to amend his answer by setting up an additional defense, was not reviewable upon appeal. At the common law, the amendment of a pleading was in the discretion of the court, and the allowance or the refusal by the court below of an amendment was not a matter which could be reviewed as error (*Hart v. Seixas*, 21 Wend. 51; *Cooper v. Bissell*, 15 Johns. 319; *Travis v. Waters*, 12 Id. 506; *Clason v. Shotwell*, Id. 31; *Chichester v. Cande*, 3 Cow. 44, note; *Mellish v. Richardson*, 9 Bing. 125; *Mandeville v. Wilson*, 5 Cranch, 15; *Chirac v. Remecker*, 11 Wheat. 177; *Graham's Practice*, 649; 2d edit. *Dunlop's Practice*, 1150). Before the act of 1830, applications for amendments in the Supreme Court were made at the general term, and afterwards before a single judge at special term, and in either case, or when an amendment was made by an inferior court, the decision was final and could not be reviewed. A rule so long and firmly established is not, in my judgment, necessarily changed by the provision in the Code allowing, before judgment, an appeal from an order made at the special term to the general term, when the order involves the merits, or affects a substan-

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tial right. A plaintiff cannot be said to have a right to deprive a defendant of the privilege of setting up a defense which, from any excusable cause, he has neglected to do, or has done in such a manner as to make it unavailable; and where a judge, in the exercise of his discretion, grants to a defendant this privilege, he does not thereby affect any substantial right of the plaintiff. It deprives him of nothing. The only effect of it is, that he is compelled to meet a defense which he would have been compelled to meet in the first instance, had the defendant set it up. It may put him to inconvenience, or delay the trial of the cause, but this is a matter for the consideration of the judge, in the exercise of his discretion to refuse the application, or in imposing the conditions upon which the amendment will be allowed. It was pertinently said by Strong, J., in *Tallman v. Hinman* (10 How. Pr. 90), that "a party cannot be said to have a right to what a court has a discretion to grant or withhold." "The legislature," he says, "must have intended, by a substantial right, a fixed, determinate right, independent of the discretion of the court, and of some value. Such a right must exist, and be injuriously affected by an order to bring the case within the fourth subdivision of the 349th section," and the allowing of amendments, whether of pleadings or proceedings, has always been a matter in the discretion of the court. There being, said Lord Kenyon, in *Rex v. The Mayor of Grampond* (7 Term R. 703), no certain rules in respect to amendments, each particular case must be left to the sound discretion of the court, and the answer of the twelve judges in *Mellish v. Richardson* (9 Bing. 125) was, that orders for amendments of proceedings were strictly and properly matters of practice in the progress of a cause, which belong by law to the exclusive discretion of the court.

Neither can an order allowing a defendant to set up an additional defense be said to involve the merits. The cause of action on which the plaintiff relies, remains as he set it forth in his complaint, and whatever were its merits when he brought the action, they continue the same. Justice Selden said, in *St. John v. West* (4 How. Pr. 329), that to allow, as involving the merits, those cases where a judge has been called upon to exercise a sound discretion in settling the equities of the parties,

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in regard to some interlocutory matter, would be reversing all the previous theory and practice of our courts, and he gives, as his interpretation of the word "merits," "the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the *discretion* or *favor* of the court." This definition was approved by Justice Strong in *Tallman v. Hinman*, *supra*; by Justice Woodruff, in *Tracy v. New York Steam Faucet Company* (1 E. D. Smith, 357); and was substantially the same as the one previously given by Justice Edmonds in *Crugar v. Douglass* (2 Code R. 123). The order in this case, therefore, tested by this rule, is not an order involving the merits.

It has been decided, however, in two cases, that an order of this nature is reviewable upon appeal. It was held by the general term of the Fourth Judicial District, in *Harrington v. Slade* (22 Barb. 161), that an order allowing a defendant to put in a supplemental answer, setting up a new defense, which, if established, was fatal to the plaintiff's action, was one from which an appeal would lie to the general term, under the third subdivision of the 349th section, as involving a substantial right. The defense set up, by the supplemental answer in that case, was not one which had arisen after the service of the answer. It existed when the action was brought, but the defendant was not then aware of it. Justice Paige (and the court, from their decision, appear to have agreed with him) regarded the order as affecting a substantial right, which he declared to be the right of the plaintiff to recover upon the previous answer of the defendant. This was assuming that a plaintiff has such a right, which he cannot have, if the court may, in its discretion, allow an answer, or other pleading, to be amended. If the issue, when once formed, could never be changed or varied, a right of this nature might exist, but not otherwise.

In *Sheldon v. Adams* (27 How. Pr. 179), Justice Bockes held that an order allowing a complaint to be amended, by adding an additional cause of action, was open to review upon appeal, as involving a substantial right, which he appears to have held

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upon the authority of the previous decision in *Harrington v. Slade*.

In the *Union Bank v. Mott* (19 How. Pr. 115; Id. 267; Id. 11 Abb. 42), it was held that an order allowing a complaint to be amended by setting up a new cause of action in such a way as to deprive the plaintiff of his legal right to answer or demur to the amended complaint, was an order involving a substantial right, in which I fully agree; for when an amendment is allowed to have such an effect as this, it does deprive the defendant of a substantial right, his right to answer or demur to the new cause of action; but no case like this can arise upon allowing a new defense to be pleaded, unless it is a counter-claim, which was not the nature of the defense allowed to be set up in the present case.

Although the order allowing the answer here to be amended by adding another defense, was not, in my opinion, appealable, I hesitate to put the affirmance of the order exclusively upon that ground, after four judges, at general term, have decided the contrary; and another judge, at special term, has concurred in the correctness of that decision. It is not necessary to do so, for there is no ground upon which it could be held that this order was improper. The courts have always been very liberal in allowing defendants to amend by setting up any additional defense. At common law, a plaintiff was not allowed to add additional counts after two terms had elapsed; but a defendant, upon proper conditions being imposed, if it were in furtherance of justice, would be allowed to amend, by setting up an additional defense, at any time before judgment (Tidd's Practice, 708, 9th London ed.) The reason for this distinction was, that the plaintiff, if he had another cause of action, could sue upon it afterward; while a defendant had to avail himself of his defense in the action brought against him, or he might lose the benefit of it (*Waters v. Boville*, 1 Wills. 223; *Dryden v. Langley*, Barnes' Notes, 22; *Skitt v. Woodward*, 1 H. Bl. 238).

In the present case, the defense which the defendant asked to set up, was one of which he ought to be allowed the benefit, it being by no means as certain as the plaintiff supposes, that

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it was not available, notwithstanding the reservation in the order made by the Supreme Court. The time that had elapsed was not material, as the hearing before the referee had not been brought to a close; and the introduction of this defense imposed no hardship upon the plaintiff. It did not require him to try the cause over again, as it was not a substitute for, and did not involve the abandonment of, the defense which had been previously made; but was one consistent with, and, in fact, growing out of it. It was merely allowing the defendant to avail himself of the effect of the award made in the Supreme Court, involving simply, on the part of the defendant, the proof of the proceedings in that court, which, in considering the effect of this amendment, it may be assumed the plaintiff could not deny. In *Stitt v. Woodward*, *supra*, the defendant was allowed to amend, with the right of the plaintiff to reply, three years after the judgment was entered up. If a defendant has, from a misconception of his rights, want of knowledge, or other excusable cause, omitted to avail himself of a defense, it is always in furtherance of justice to permit him to set it up upon proper terms, if the application is made in good faith, and the allowing of it will work no injustice to the plaintiff. Such was the case here, and the order appealed from should be affirmed.

CARDOZO, J.—I have no objection to affirming the order in this matter, because I agree with Judge Daly that it is right. But I do not wish to be understood as yielding to the authority of the cases relied upon, that the order is appealable. I think it rested in discretion, and is not reviewable. My views of the case of the *Union Bank v. Mott* (19 How. Pr. 267), and of *Allaben v. Wakeman* (10 Abb. Pr. 162), to similar effect, and of the distinction between such cases, and those like the present, have already been expressed, and received the sanction of the general term, in *Schermerhorn v. Wood* (30 How. Pr. 316).

Order affirmed.

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HERMAN FUCHS v. CARL POHLMAN.

The time within which an appeal may be taken from a District Court judgment, begins to run from the time the judgment is actually entered, and not from the date of the decision upon which judgment was entered.

The service of a notice of appeal from such a judgment, made upon the respondent's attorney, instead of the respondent personally, is sufficient, if the latter cannot, after due diligence, be found.

What will be deemed due diligence in such a case,—considered.

APPEAL from an order of the special term, dismissing an appeal from a judgment of the Second District Court.

The action was tried on the 8th day of May, 1866. It appears to have been understood between the attorneys that the justices should take his own time to decide the case, and that time should be given for appeal. The defendant sent several times a week to ascertain if the case had been decided, and twenty days after the trial was informed by the justice that he had not yet decided it.

On the 10th of June, judgment was entered for the plaintiff, although dated May 15, 1866. The defendant perfected his appeal, but was unable to find the respondent, and hence served the notice of appeal on his attorney.

The respondent moved at special term to dismiss the appeal, and from the order granting the motion the defendant appealed to the general term.

Otto Meyer, for appellant.

S. B. Noble, for respondent.

BY THE COURT.—DALY, F. J.—From statements in the opposing affidavits, which are uncontroverted, it is manifest that the judgment was rendered about the 10th of June, and if it bears date as of the 15th of May, it must have been antedated.

The case was tried on the 8th of May, and by statute (Laws

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of 1857, vol. 1, p. 720, § 47), the justice was bound to give judgment within eight days thereafter; that is to say, on or before the 15th of May. There appears to have been an understanding to the effect that he might take his own time, but however that may have been, it appears, for the fact is not contradicted, that he told the defendant's attorney, *twenty* days after the trial, that the case was not then decided, and two or three times a week, from the day of the time to the 10th of June, the attorney was informed by the clerk and the justice that no judgment had yet been rendered. If it bears date as of the 15th of May, the justice must have antedated it, probably under the impression that it was his duty to date it, not of the day when he actually rendered it, but of the last day of the time within which he could render it, which was the 15th of May. From the 15th of May to the 10th of June was twenty-six days, so that if the time to appeal were to be computed from the day of the date of the judgment, the effect would be to cut the defendant off from the right of appeal altogether. If the date of the judgment were conclusive, the twenty days, within which the appeal must be brought, would end on the 4th of June, and the judgment was not rendered until the 10th, the date is not conclusive. The appeal may be taken within twenty days after the judgment was rendered, and the time when it was actually rendered may be shown, for were it otherwise, it might be in the power of a justice, by his own act, to prevent an appeal in any case by delaying his decision for more than twenty days, and then antedating the judgment. If it were rendered after the time which the law prescribes as the limit, whatever may have been the date affixed to it, the justice would have to return upon the appeal according to the fact, and if a motion is made to dismiss the appeal, on the ground that it was not brought within twenty days after the judgment bears date, the appellant, in answer to that motion, may show that the judgment is antedated, and that he brought his appeal within twenty days after it was actually rendered. The defendant had a right to assume that it was rendered on the 10th of June. He had been very diligent in his inquiries, and from the information he received from both clerk and judge, he had the

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right to conclude that the decision was given on or about that day. Every intendment in such a case is to be in his favor, for he is not to lose his right of appeal in consequence of the erroneous act of the justice. Within twenty days from the 10th of June, he served a notice of appeal upon the justice, and upon the attorney who appeared for the plaintiff upon the trial, having been unable to find the plaintiff or his place of residence after the most diligent inquiries, and he had the requisite undertaking approved by the justice. This was all he could do to perfect his appeal. It was well brought, and the motion to dismiss it should, in my judgment, have been denied.

BRADY, J., concurs.

CARDOZO, J. (dissenting).—The ground upon which I dismissed the appeal from the District Court, seems to have been misapprehended, both by the present appellant and by the first judge. I did not, and do not, doubt the entire accuracy of the views which Judge Daly entertains as to the effect of the ante-dating of the judgment, and of the right to establish, by evidence, that the appeal was taken within the statutory limit after the actual date of the judgment. The ground on which I dismissed the appeal, and upon which I am still of opinion that I acted correctly, was, that the appellant did not serve the notice of appeal on the respondent personally. The omission to make such service personally was not questioned, and the affidavit, in my judgment, failed to show due, or any, diligence to find the respondent.

The respondent's affidavit, which, in this respect, was not denied, stated that on the trial of the action, his place of residence in this city was disclosed. The appellant, or his attorney, therefore, knew the respondent's residence. They also knew the residence of the respondent's attorney, and called upon him to accept service of the notice of appeal. Yet it does not appear either that any attempt to find the respondent at the place mentioned on the trial as his abode, or that any inquiry there, or of the attorney, was ever made. The appellant contented himself with calling upon the secretary of the Cabinet Maker's

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Society, which was the extent of the "due diligence" which he made to ascertain the residence of the respondent.

I think something more than this was necessary. For that reason, I dismissed the appeal below, and for that reason, I think the order so made should be affirmed.

Order reversed.

JAMES REED and others v. GEORGE A. ST. JOHN, Trustee, &c.

If there has been an omission to comply literally with the condition respecting notice, in a covenant for a renewal of a lease of land, equity will relieve where a fair intimation of an intention to renew has been given, and no injury has been done to the other party; but not where there has been gross laches, or the neglect has been willful.

Where one party is bound to avail himself of a covenant, to give notice within a certain time, and the other directs the notice to be sent to him by mail, it is sufficient if it is deposited in the post office within the time, though it does not reach the other party until a day or two afterward.

APPEAL by the defendants from an order made at special term.

The defendant, St. John, demised to the plaintiffs, copartners, under the firm name of Read, Gardner & Co., "the premises 52 and 54 Park Place and 49 Barclay street, for two years, from May 1, 1864, at the rent of \$10,000. The lease contained this covenant, to wit: "And it is further agreed between the parties hereto, that in case the parties of the second part shall give six months' written notice previous to the expiration of this lease, of their desire to renew this lease upon the same terms for a further term of two years, this lease shall be extended or renewed accordingly."

On the 31st of October, 1865, the plaintiffs mailed a notice, signed "Gardner, Dexter & Co.," to St. John, at Norwalk,

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Conn., he having moved there, notifying him of their desire to renew the lease. It was claimed that the defendant had given the plaintiffs his address there, and directed them to communicate to him by mail any matters relative to the demised premises; and told them that any letters so addressed, would reach him in twelve hours. The defendant, St. John, alleged that he gave his address merely in order that he might be notified of any needed repairs. The notice so mailed was not received until November 4th. The defendant, St. John, did not call for his rent November 1st, as was his custom, but, coming to the city for that purpose on that day, he was taken ill, and was only able to call on November 3d, and was then personally served with a copy of the notice, on his stating he had not received the one mailed. No objection was then made as to the time, manner, or sufficiency of such service, but on the 21st December, 1865, he notified the plaintiffs that, considering the use they had made of the premises by storing cotton to his prejudice, he would not accept the notice of renewal as a compliance with the lease, and, on the 19th March, 1866, he conveyed the premises to the defendant, James R. Smith, who, on that day, notified the plaintiffs to surrender the premises on May 1st, 1866.

The plaintiffs, thereupon, commenced this action, to compel a renewal of said lease, and praying for an injunction to restrain the defendants from proceeding to eject the plaintiffs from the demised premises. On a motion for the injunction, the following opinion was given at special term:

CARDOZO, J.—I have concluded, though with some hesitancy, that this is one of the cases in which the relief sought should be granted, within the rule laid down in *Rawstorne v. Bentley* (4 Brown's Ch. R. p. 415). The delay in giving notice was but a few days, even if the notice served by mail be laid entirely out of consideration. But it seems to me, upon a very careful consideration of the conflicting affidavits, as to the verbal authority given by the defendant to the plaintiffs to communicate with him by mail respecting the matters of the tenancy, that the plaintiffs might have been misled into the belief that the authority extended to the notice requisite to effect the renewal,

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and that, therefore, a case of surprise or accident, without their fault, is presented, which calls for the interposition of the court.

Although it may be true that the service of notice would effect the contemplated extension of the lease, yet, that can only be so, when the strict letter of the covenant has been complied with.

Where equitable considerations, which cannot be available before a magistrate as a defense to proceedings to dispossess a tenant, are to be resorted to, an application to a court of equity is necessary and proper.

The injunction prayed for, will, therefore, be allowed, upon such undertaking as may be reasonable, the amount of which will be fixed upon the settlement of the order herein, and upon the further condition, that the plaintiffs stipulate that, if an appeal be taken within five days, they will, if the appellants desire, accept notice of argument for the third Monday of the present month.

From this decision, the defendants appealed to the general term.

Hamilton W. Robinson, for appellants, as to insufficiency of notice, cited *McDermott v. Board of Police* (5 Abbott Pr. 422); *S. C.* (25 Barb. 635); *Rathbun v. Acker* (18 Barb. 393; 1 Rev. Stat. 606, § 4; 4 Kent Com. 125). As to the equities of the case, he cited Story's Equity Jur. § 1323; *House v. Burr* (24 Barb. 525), and claimed that the plaintiffs were not free from laches.

Stephen P. Nash and *H. R. Cumming*, for respondents, cited *Vassar v. Camp* (11 N. Y. 441); *Rawstorne v. Bentley* (4 Brown Ch. 415); *Viele v. Troy & Boston R. Co.* (20 N. Y. 184); *Edgerton v. Peckham* (11 Paige, 352).

BY THE COURT.—DALY, F. J.—The defendant, St. John, covenanted to renew if the lessees should give six months' written notice previous to the expiration of the lease, of their desire to renew it. After the covenant was made, St. John removed

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from this city to the State of Connecticut, and prior to his removal, he called upon the agent of the lessees, and directed him to communicate to him at Hermitage, East street, Norwalk, Connecticut, by mail, any matters relative to the premises which the plaintiffs, as tenants, might desire to communicate, and informed him that any letter so addressed and mailed would reach him within twelve hours. The lease terminated on the 1st of May, 1866, and on the 31st of October, 1865, the agent of the plaintiff sent a written notice to the defendant, St. John, advising him that the plaintiffs desired to renew the lease for two years longer, which he inclosed in an envelope addressed to St. John as above stated, and put it in the post office of this city, paying the postage. St. John left Norwalk on the 1st of November, 1865, before receiving the notice, and came to this city. On the 4th of November he called at the plaintiffs' place of business to collect the rent of the premises, where he saw the plaintiffs' agent, and was informed that the notice desiring a renewal had been sent to him as stated, and upon the defendant, St. John, saying that he had not received it, a copy of it was delivered to him. It does not appear that he made any objection then that the notice had not been sent to him in time, and on his return to his residence, on the same day, he found there the notice which had been mailed to him.

On the 20th of December following, St. John sent a letter advising the plaintiffs, that as he had not received any notice of the desire of the plaintiffs to renew the lease until the 3d of November, 1865, and, *considering the use that had been made of the premises, by storing cotton within it to his prejudice*, he was unwilling to accept the notices which had reached him at too late a date to be a compliance with the provisions of the lease. On the 15th of January following, he made a contract for the sale of the premises to the defendant Smith, and on the 19th of March thereafter, he conveyed them to Smith.

As St. John had advised the plaintiffs, through their agent, that any communications they had to make as tenants, respecting the premises, were to be addressed to him by mail, I am disposed to think that the depositing of the letter containing the notice, in the post office of this city, addressed as he had re-

quested, and the payment of the postage, on the 31st of October, 1865, the day before the six months began to run, was a good service. Where a statute provides for the giving of notice within a certain time, and does not point out the mode in which it is to be given, it must be served upon the party in person within that time, or it must be shown that he received it within the period (*McDermott v. The Board of Police*, 25 Barb. 635). But where a party directs notice to be sent to him through the post office, addressed to him at his place of residence in another State, I am disposed to think that the service is good if it is deposited in the post office, as this was, within the time. It probably reached Norwalk on the following day, so as to make, in any event, but a difference of a day in a six months' notice.

It is insisted that if the notice was in time, it operated as a renewal of the lease, and that there is no ground for bringing this action. The giving of the notice would, as against the plaintiffs, charge them with the payment of rent, according to the terms of the original lease, if they remained in possession; but if they had, as they appear to have had, by the terms of the covenant, a right to a lease for a further term of two years, upon giving notice, they might bring an action to compel the specific performance of the contract, and there was no reason why they should rest in doubt, or run any hazard as to the construction which might be put upon the sufficiency of the notice, in law, when they could be relieved in equity. Lord Redesdale, in *Lennon v. Napper* (2 Sch. & Lef. 682), reviewed at length the grounds upon which a court of equity will compel a specific performance of a covenant to renew an estate in land, where there has been a neglect to comply literally with the condition upon which the renewal was to be granted, and the rule to be collected from his statement is, that equity will not relieve where there has been gross laches, or the neglect was wilful, but will do so where the party has acted fairly, and no injury was done to the other party by the failure to do the act required strictly within the time. The present case is within the rule laid down by this eminent judge. The plaintiffs meant to give notice in time, and in the mode which the defendant St. John had requested, and their mistake, assuming that notice was not given

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within the time, resulted only in the loss of a single day, and was, at the time, productive of no injury to the defendant, for it was not until two months and a half afterward that he made a contract for the sale of the premises. He does not appear to have made any complaint when he was advised, on the 3d of November, of the notice, and the fact that he assigned an independent reason, the storing of cotton, when he advised them a month and a half afterward of his refusal, shows that the refusal was an afterthought. The fact that the notice was given in the name of the new firm, was immaterial. The defendant, St. John, knew of the change in the firm, and he had collected the rent from them. In *Maxwell v. Ward* (11 Price, 16), the condition was that the notice of the intention to renew was to be *in writing*, but the Lord Chief Baron Richards said that the court would relieve, notwithstanding the objection that the notice was not in writing, if it could be shown that a fair intimation of an intention to renew had been given in any way. These two cases will suffice to show the liberal principles upon which a court of equity acts where there has been a failure to give the notice of the intention to renew strictly within the time, and I think Judge Cardozo was right in holding that this was a case fairly within the rule by which they are guided.

Order affirmed.

Watson v. McGuire.

THOMAS WATSON v. JOHN MCGUIRE.

To authorize an order of arrest, under subdivision three of section 179 of the Code of Procedure, on the ground that the property replevined has been concealed, removed, &c., by the defendant, it must not only appear that the property has been concealed, removed, or disposed of, but that such concealment, removal, or disposal, was made with the intent that the property should not be found or taken by the sheriff, or with the intent to deprive the plaintiff of it.

APPEAL by the defendant from an order at special term, denying a motion to vacate an order of arrest granted under the third subdivision of section 179 of the Code of Procedure.

The facts are stated in the opinion of the court.

Alexander H. Reavey, for appellant.

N. A. Chedsey, for respondent.

By THE COURT.—CARDOZO, J.—The action is to recover certain personal property, and upon an affidavit and the certificate of the sheriff that the property has been eloiigned and concealed by the defendant, so that it could not be taken by the sheriff, an order under subdivision three of section 179 of the Code was granted, to arrest the defendant. A motion to vacate the order on the papers on which it was issued was made and denied. The grounds on which the motion was based, and on which we are asked to reverse the decision below, are, 1st, That no fact is stated from which the judge could conclude that the property was eloiigned or concealed; and, 2d, That, at all events, there is no fact from which it can be inferred that such eloiigning or concealment was with intent that the property should not be found, or taken, or with intent to deprive the plaintiff of the benefit thereof.

Perhaps the statement that property has been eloiigned, that is, removed to a distance, may be considered as an assertion of a fact, and not being disputed in this case by any opposing affidavit, it is to be regarded as established that the defendant did remove and conceal the property. But that is not enough,

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under the statute, to justify an order of arrest. The statute requires, before that remedy shall be allowed, that two matters shall be established, viz.: 1st, That the property has been removed or concealed by the defendant; and, 2d, That such removal or concealment was with intent that it should not be found or taken by the sheriff, or with the intent to deprive the plaintiff of it. The former of these propositions is established, but not the latter, unless we infer it from the existence of the former, which the statute does not permit.

Both before and since the amendment of 1857, this section has been construed in accordance with these views (*Van Neste v. Conover*, 5 How. Pr. 148; *Roberts v. Randel*, 5 How. Pr. 327; *Pike v. Lent*, 4 Sand. S. C. R. 650; *Mulvey v. Davison*, 8 How. Pr. 111; *Reimer v. Nagel*, 1 E. D. Smith, 258). To give any other construction to the statute is practically to declare that an order of arrest may be allowed in every case where the property has either been removed or concealed.

I think the order below should be reversed.

 THOMAS BOYLESTON v. LAWRENCE R. KERR.

A police officer or constable cannot arrest a person, without a warrant, for a breach of the peace not committed in his presence.

Words or acts of provocation, to have the effect of a breach of the peace, must tend *immediately* to that effect. Hence it is not, as matter of law, a breach of the peace for one who, taking a meal at a restaurant, fraudulently substitutes the check given him there for one of less amount, which latter he pays. And where, under such circumstances, the keeper of the restaurant calls a police officer, and orders the arrest of such a person, *Held*, that he is liable in damages, although the facts will justify nominal damages only.

In an action against the keeper of a saloon, for causing the plaintiff's arrest, on account of his having substituted and paid a check for a smaller amount than the one received for his dinner: *Held*, that the defendant was liable for damages.

Semble, that if the magistrate had convicted the plaintiff, under the Laws of 1833, p. 11, § 8, of disorderly conduct, in his opinion tending to a breach of the peace, it might have been available as a defense.

A police officer or constable may arrest a person *virtute officii*, without warrant, for a breach of the peace, only when committed in his presence.

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APPEAL by the defendants from a judgment of the Marine Court at general term.

The action was brought for false imprisonment. The plaintiff testified that he went into defendant's saloon, and called for dinner to the amount of fifteen cents, received a check for that amount, and paid it to the bar tender; that after he had reached the street, the defendant came out, and had plaintiff arrested by a policeman, and taken to the Jefferson Market Police Court, and detained there four hours. The plaintiff resting, the judge held that the answer, even if true, did not constitute a defense; but testimony thereunder was given, by consent of plaintiff's counsel, to the effect that the plaintiff had eaten a dinner to the amount of forty cents, and receiving a check for that amount, had substituted the fifteen-cent check therefor, and paid that amount, instead of forty cents. On the close of the testimony, the judge charged the jury as follows:

"That the arrest of plaintiff was unlawful, and that the offense with which he was charged was not such an act that he could be arrested therefor. That the arrest of the plaintiff was the act of the defendant, and that the officer was likewise guilty of false imprisonment. That the only question in the case is what amount of damages the plaintiff ought to recover; and that the conduct of the defendant was without justification; but from the course which has been permitted to be pursued, by the letting in the evidence on the trial as to the question of the fraudulent substitution of the fifteen-cent check for the forty-cent check or *not* by the plaintiff, the jury were permitted to consider the question for the purpose of mitigating damages." To which charge the defendant duly excepted. A verdict for the plaintiff in the sum of fifty dollars was rendered, from which the defendant appealed.

John H. White, for appellant.

Henry Morrison, for respondent.

DALY, F. J.—We cannot say that the justice erred. The act for which the plaintiff was arrested was not a criminal offense. He was supplied with certain articles of food at the defendant's eating saloon, and received a check indicating the

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amount to be paid at the bar, which check, it was alleged, he kept, and substituted in its place one which he had in his possession for a much smaller amount, which was taken as the true voucher, and the amount of which only, he paid. However reprehensible or contemptible such an act may have been, it was not one for which he could be punished criminally, and as the plaintiff testified that the defendant directed the police officer to take the plaintiff into custody—a fact which the defendant did not controvert—and as the arrest was made without a warrant, the defendant, as a party assisting in the making of an unlawful arrest, was liable to an action (Dalton, c. 170, §§ 3, 5). There was no breach of the peace to authorize an arrest without warrant. If the magistrate had convicted the plaintiff under the act (3 Laws of 1833, p. 11, § 8), of disorderly conduct, *in his opinion* tending to a breach of the peace, that circumstance might have been available as a defense; but all that appears from the return is, that the magistrate discharged the plaintiff. The return does not state whether he was convicted and required to give security for good behavior before he was discharged, or not, and as matter of law, we cannot hold that the act was one tending to a breach of the peace. Words or acts of provocation, to have that effect, must tend *immediately* to a breach of the peace (4 Inst. 181; *The Queen v. Langley*, Salk. 697), and we cannot say that the direct and immediate tendency of the plaintiff's act was to provoke a breach of the peace.

CARDOZO, J., concurred.

BRADY, J.—Upon an examination of authorities bearing upon that subject, I held in *Willis v. Warren*, (1 Hilton Rep. 590), the rule to be, that a police officer or constable might arrest a person *virtute officii*, without warrant, for a breach of the peace committed *in his presence*. The arrest of the plaintiff was therefore unlawful; but the defense interposed, if true, was such as would justify the award of nominal damages only. Judge Alker instructed the jury that they might consider the defense proved in mitigation of damages, and the defendant had the benefit of all that could be ruled in his favor.

Judgment affirmed.

HENRY GREENBAUM *and others* v. ALEXANDER D. STEIN.

An order of arrest for fraud in contracting the debt, under section 179, subd. 4, of the Code, may be granted in an action upon a judgment recovered upon the debt. *So held*, in an action upon a foreign judgment.

When a question has been fully considered, and deliberately determined, and there is a conflict in other cases upon the same point, the decision should be adhered to in the court in which judgment was pronounced, until disturbed upon adjudication of the court of last resort.

APPEAL by the defendant, from an order at special term, denying a motion to vacate an order of arrest. The action was brought upon a judgment recovered in the Circuit Court of Cook County, Illinois, on the 4th day of September, 1865, for \$3,766 65.

On an affidavit setting forth the fraud of the defendant in contracting the debt upon which the judgment was obtained, an order of arrest was granted. The defendant moved, upon affidavits, to vacate the order of arrest, which motion was denied, and the defendant appealed.

C. A. Runkle, for appellant.

F. C. Barlow, for respondents.

DALY, F. J.—In *Wanzer v. De Baun* (1 E. D. Smith, 261), I discharged the order of arrest upon the ground that it could be granted only in an action brought to enforce the contract. I was of opinion that the Code had simply preserved the right to arrest in the case in which it had been allowed under the act to abolish imprisonment for debt; that is, where the defendant had fraudulently contracted the debt, or incurred the obligation respecting which *the suit was brought* (Laws of 1831, p. 397, § 4, subd. 4). That the 4th subd. of § 179, is confined to cases in which the cause of action is the contracting of a debt or the incurring of an obligation, or for the taking, detention, or concession of property, or to recover damages for fraud or deceit,

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and does not provide for the case of an action upon a judgment, even though the defendant might have been arrested in the action in which the judgment was obtained. The judgment itself becomes a debt of record, and the contract, or other cause of action upon which it was founded, is merged in it. It is a bar to any other action founded upon the original promise or cause of action, and this rule applies, though the judgment was recovered in another State (*Besley v. Palmer*, 1 Hill, 482; *Suydam v. Barber*, 18 N. Y. 470; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. M'Connell*, 3 Wheat. 234).

An appeal was taken from my decision, and the question was carefully examined by my then colleague, Judge Woodruff, who came to the conclusion that this construction was erroneous, and, as Judge Ingraham agreed with him, the order of the special term, discharging the arrest, was reversed.

The substance of Judge Woodruff's conclusion was briefly this: That the action upon the judgment is for the recovery of a debt, a debt then due by judgment, but none the less a debt. That the cause of action is technically merged in the judgment, but not so as to preclude the court from looking behind the judgment to see upon what it was founded. That if the original debt was fraudulently contracted, the fraud is fastened upon it through every form which the evidence of the debt may assume, and remains until the debt is paid, or otherwise discharged. That the recovery of a judgment, and the return of an execution unsatisfied, may be the only means by which the fraud is first discovered, where, as is sometimes the case, judgment is confessed at the time of the sale, under a stipulation that no execution is to issue until the term of credit has expired. That when an action is brought upon the judgment, the court, for the purposes of the merely *collateral* question, whether the plaintiff in that action can hold the defendant to bail, will, and are bound, by the plain terms of the Code, to look through and beyond the mere forms of the security held by the plaintiff, to the origin of the transaction. That they will, and ought to, regard the *substance* of the plaintiff's claim, viz., the *debt*, rather than the form or shell by which it is encompassed.

Justice Mitchell, afterward, in *Goodrich v. Dunbar* (17

Barb. 644), came to the same conclusion that I did, and discharged an order of arrest. But, the arrest there, was under the 2d subd. of sec. 179, for the nonpayment of money received in a fiduciary capacity, where, perhaps, it more explicitly appears that the arrest is to be in the action brought for the recovery of the money; and in *Peel v. Elliott* (16 How. Pr. 484), Justice Davies, in consequence of the decision of Justice Mitchell, declined to pass upon the question, and formally denied the motion, that the judgment of the general term might be taken.

In *McButt v. Hirsch* (4 Abb. Pr. 443), which was an action brought upon a judgment recovered in the Marine Court of this city, Judge Brady discharged an order of arrest, granted upon the ground that the defendant fraudulently contracted the debt upon which the judgment was recovered. He followed the decision of Justice Mitchell, assigning, as an additional reason, that the order of arrest, by the 183d section, may be made at any time *before judgment*, indicating that the previous section did not contemplate an arrest in an action *upon* a judgment, and he declined to follow the case of *Wanzer v. De Baun* (supra), upon the ground that the judgment there was recovered in another State. "Whether," he said, "the doctrine of *Wanzer v. De Baun*, be correct or not, the judgment, when recovered in this State, quiets all question in respect to the subject matter, and the remedies applicable thereto. The judgment is exclusive, and the creditor's further remedies are upon it alone. He should not be permitted to revive or revert to the original cause of action, incidentally or otherwise, in an action upon his judgment, for the purpose of acquiring any omitted provisional remedy." It does not appear by the report, that the judgment in *Wanzer v. De Baun*, was recovered in another State, but, if it had been, it is settled, by the authorities before cited, that the cause of action would have been merged in it, quite as effectually as if it had been recovered in this State, and, if Judge Woodruff's general view is correct, the 183d section would be no obstacle, as the order of arrest can be made before judgment in the action upon the judgment.

In *Arthurson v. Dalley* (20 How. Pr. 316), which was an

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action upon a judgment recovered in a foreign country, Justice Hogeboom denied a motion to discharge an order of arrest, granted upon the ground that defendant received the money for which the judgment had been recovered in a fiduciary capacity. He held, that, being a foreign judgment, the plaintiff was not precluded, as he might be in a domestic judgment, from going back to the original cause of action; but even if estopped by the record from going behind it, the record itself showed that the money had been embezzled, and that this was sufficient to entitle him to the provisional remedy of an arrest, which was holding, in fact, that an arrest was allowed by the Code in an action upon a judgment.

In *Mallory v. Leach* (23 How. Pr. 507), Justice Bockes dissents from this latter conclusion of Justice Hogeboom, and, in an elaborate opinion, comes to the conclusion that an order of arrest cannot be granted under any of the subdivisions of section 179, in an action upon a judgment, a conclusion which, I think, was correct.

In this conflict of opinion, the proper course, in respect to *Wanzer v. De Baum*, is, to apply the maxim, *stare decisis*. As the point was maturely considered by the two able and experienced judges who then constituted the majority of the court, the decision should stand until the question is settled by the court of last resort (4 Kent's Com. 476). When a question has been fully considered and deliberately determined, and there is conflict in other cases upon the same point, the decision should be adhered to in the court in which it was pronounced (*Harris v. Clark*, 2 Barb. 101; *People v. Tredway*, 3 Id. 474; *People v. Mayor of Brooklyn*, 9 Id. 544; *Woolsey v. Judd*, 4 Duer, 379; *Baker v. Lorrillard*, 4 N. Y. 261; *Leavitt v. Blatchford*, 16 Id. 544; *Olcott v. Tioga Railroad Co.* 26 Barb. 157).

The judge, at the special term, finding a decision of the general term expressly in point, refused to discharge the arrest, and the order he made should be affirmed.

BRADY, J.—I was not a member of this court when the case of *Wanzer v. De Baum* was decided. Without expressing an opinion as to the accuracy of the judgment pronounced in that

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case, I agree with Judge Daly, that, having been rendered after solemn deliberation, the doctrine established by it, should not be disturbed, except upon an adjudication of the court of last resort.

Order affirmed.

JOHN KELLY v. THE EMIGRANT INDUSTRIAL SAVINGS BANK.

A depositor with a savings bank is charged with notice of a regulation of the bank, which is printed in his pass-book, given to him at the time of the deposit, that "payments to persons producing the pass-book shall be valid payments to discharge the bank;" and he is bound promptly to notify the bank of the loss of his pass-book. A payment to a person producing a depositor's pass-book, and an order with his forged signature, two days after the loss of the pass-book by the depositor, without notice to the bank of the loss: *Held*, to exonerate the bank from liability, the depositor having been negligent in delaying to give notice of his loss.

It seems that a by-law of a savings bank, which declares that payments of deposits to any person producing the depositor's pass-book shall be valid payments to discharge the bank, is void, as not being within its charter power to prescribe regulations for the return of deposits. (Per CARDOZO, J.)

APPEAL by the defendants from a judgment of the First District Court.

This was an action brought to recover the sum of \$100, a balance of certain deposits made with the defendants by the plaintiff. On the 4th day of July, 1864, the plaintiff lost or had stolen from him the pass-book given him by the defendants. On the 10th of July he wrote the defendants, notifying them of his loss. On the 6th day of July, or two days after the loss, the defendants had paid the \$100, to the party presenting the book, accompanied by a forged draft signed with the plaintiff's name.

On the part of the defendants, it was claimed that they are a corporation, incorporated under chapter 290 of the laws of 1850. By section six of that act, defendants were authorized to receive deposits. That section further provides, "that such

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deposits shall be repaid to each depositor when required, and at such times and with such interest as the board of managers shall, from time to time, prescribe, which regulations shall be put up in some public or conspicuous place in the room where the business of the company shall be transacted." In pursuance of such power, the board of managers prescribed the following regulations: "Sec. 4. All deposits and all payments shall be entered at the time they are made, in the books of the bank, and also in the pass-book of the depositor, who shall then examine the same. The pass-book shall be the voucher of the depositor, and the possession of the pass-book shall be sufficient authority to the bank to warrant any payment made and entered in it."

"Sec. 12. Although the bank will endeavor to prevent fraud on its depositors, yet all payments to persons producing the pass-books issued by the bank, shall be valid payments to discharge the bank. In the case of lost books, the bank will decide as to the person to whom payments shall be made, and without the right of the depositor in such lost book to question the correctness of the payment."

These regulations were printed in the pass-book of the plaintiff, and posted conspicuously in the bank. The plaintiff could both read and write. Judgment was rendered for the plaintiff, and the defendants appeal to this court.

Charles E. Miller, for appellants.

Charles M. Marsh, for respondent.

CARDOZO, J.—The by-laws by which the defendants claim to protect themselves for payments made, under any circumstances, to the person who has possession of the deposit book, if they bear that construction, are, I think, void, as not being within the power granted by their charter.

Section 6th of the defendant's charter (Session Laws of 1850, chap. 290, p. 633) provides, among other things, "that the deposits shall be repaid to each depositor when required, and at such times, and with such interest, and under such regu-

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lations as the board of managers shall from time to time prescribe." That section contains the only power under which the defendants claim to make the fourth and twelfth by-laws; by the former of which "possession of the pass-book" is declared to "be sufficient authority to the bank to warrant any payment made and entered in it," and by the latter of which "all payments to persons producing the pass-books issued by the bank" are to "be valid payments to discharge the bank."

The 6th section of the charter fully authorizes the bank to pass by-laws prescribing, within reason, such guarantees of the identity of the depositor, as may be necessary for its protection, before it can be required to return the deposit (*Warhus v. Bowery Savings Bank*, 21 N. Y. 543). But it cannot go beyond that (see same case, 5 Duer, 71). It is authorized to prescribe regulations under which the money shall be returned to the depositor; and it may require proof of his identity—production of the pass-book, or an account of it, if it cannot be produced—and any other evidence which may be reasonable to satisfy the bank that the claimant is the person entitled to the deposit. But a by-law which declares that, although the claimant be not the right party, yet, if he has possession of the pass-book, even though feloniously obtained, a payment to him shall protect the bank, is not a regulation for the return to the depositor of his money, but is a provision by which, in effect, he is to forfeit his money in a certain event, as to the happening of which he may have been wholly innocent. It is an attempt, without authority, to change the rule of law, which would otherwise exist, and to strip the business of the defendants of that risk which from its nature is inherent, and to shift it upon the depositor. This the defendants cannot do. They may exact satisfactory evidence that they are paying the right person, but if, after all, they should be deceived, they must bear the consequences of the error, if the depositor has not contributed to it.

If there were nothing else in this case, I should think this judgment right. But it appears that the plaintiff knew of the loss, and probably suspected that the pass-book had been stolen, as early as the 5th of July. He was then in Philadelphia, and

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a letter or a telegram would have readily reached the defendants before the 6th of July, when they made the payment, and would have enabled them to avoid the loss, and to guard against the thief and forger. But instead of promptly advising the defendants of the theft of the book, as it was his duty, and as good faith toward them required he should do, the plaintiff rested quietly until the 10th of July, before giving any notice to them of the loss he had sustained. This negligence upon his part enabled the thief to practise a fraud upon the defendants, and to procure from them the money of the plaintiff, and he should not be permitted to recover when his own negligence, so gross as almost to amount to bad faith, has contributed to the misfortune. For this reason I think the judgment below erroneous, and that it should be reversed.

BRADY, J.—I think the agreement on the part of the plaintiff with the defendants was, that payments to persons producing the pass-books should be valid payments to discharge them (12th section "By-laws of the Business of the Bank"). If it was not an agreement it was a regulation of which, being printed in the pass-book, he must be charged with notice, and subjected to the duty of giving notice to them promptly of the loss of the book. It does not appear in this case that the payment was made upon the draft alone, or that the draft was regarded as of any importance. If we give to regulation just referred to, the weight which it seems entitled to, then the draft was really of little importance, inasmuch as the person who presented it had the pass-book, and that was the voucher upon which the bank was justified in acting. The result of these views is, that the plaintiff loses his money by negligence. He should have advised the bank at once of his loss, as suggested by Judge Cardozo.

DALY, F. J., concurred.

Judgment reversed.

Heye v. Bolles.

AUGUSTUS W. HEYE, *and others*, v. JESSE N. BOLLES, *and others*.

A creditor who has obtained and levied an attachment upon a debtor's property, and afterward, upon a judgment recovered, has issued an execution, is entitled to the equitable intervention of the court to set aside a fraudulent transfer of the property upon which the attachment lien rests, or any fraudulent obstacle in the way of enforcing the lien, without waiting the return of the execution unsatisfied.

A denial, in an answer, of a "want of knowledge sufficient to form a belief," of an allegation of the complaint is insufficient, and the allegation of the complaint must be taken as admitted. The denial must be of any knowledge or information.

Where one partner of an insolvent firm purchased the interest of his copartner in the assets, and then made a general assignment, with a direction, first, to pay his individual debts: *Held*, That the assignment was void, as made in fraud of the creditors of the firm.

APPEAL by the plaintiffs from a judgment at trial term, dismissing the complaint.

The action was brought by the plaintiffs as judgment creditors of John E. Cook and Charles K. Howlett, to set aside as fraudulent and void, an assignment made under the following circumstances. Cook & Howlett were doing business in October, 1860, and were then insolvent.

John E. Cook was also a member of the firm of Cook & Twining, composed of himself and Thomas A. Twining, also doing business in New York. The firm of Cook & Twining was then, and had been during their whole copartnership, insolvent.

On the 22d day of October, 1860, Howlett executed an agreement with his partner Cook, whereby he agreed to sell him his interest in the concern of Howlett & Cook, for \$230 in cash, and his release from two notes of \$2,500 each to one Underdonk; the sale to take effect on the payment of the \$230, and the destruction of said notes. This money and these notes were never paid.

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On the 16th November, 1860, Cook also proposed, for the consideration of one dollar, to buy all the interest of Twining in and to the property of the insolvent firm of Cook & Twining. On the same day, Cook having thus obtained possession of the property of both firms, and having also individual property, made the assignment in question to the defendant Bolles of all the partnership property of Howlett & Cook, of all the partnership property of Cook & Twining, and of his individual property.

The alleged debt of \$5,663.42 to Cook's mother, was a fictitious debt. Friendly suits were commenced thereon by Cook's mother against him, judgment obtained, execution issued, and supplementary proceedings instituted, to reach the assigned property, and give her an unlawful and fraudulent preference; and the defendant, the assignee, with a full knowledge of all these facts, paid the mother, out of the assigned property, the whole amount of her pretended claim, \$5,663.42.

Cook, the assignor, remained in possession of the assigned property from the time of the assignment in November, 1860, until May, 1861, selling and disposing of the same, and applying the proceeds to the rent of his store, his individual use, and other expenses, until the plaintiffs commenced an action against Howlett & Cook for their debt, issued an attachment therein to the sheriff of New York, levied the same on the partnership property of Howlett & Cook, and the individual property of John E. Cook, proceeded to judgment, and issued execution thereon. They then brought this action, alleging that they are prevented from enforcing the same, and collecting their judgment, by reason of the fraudulent assignment and obstructions interposed thereto; and pray judgment that the said assignment be adjudged void. At the conclusion of the evidence, the court dismissed the complaint, and the plaintiffs appealed.

L. I. Lansing for appellants.

I. An answer is insufficient if it denies merely on information, or merely on knowledge; here, the defendant denies merely for want of knowledge (*Hackett v. Richards*, 3 E. D.

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Smith, 13; *Edwards v. Lent*, 8 How. Pr. 28; *Blake v. Eldred*, 18 Ib. 240; *Elton v. Markham*, 20 Barb. 349).

II. The plaintiffs, by their proceedings in their action at law, set forth in the complaint, acquired a specific legal lien upon both the partnership property of Howlett & Cook, and the individual property of Cook. The attachment under the Code is an execution by which the debtor's property may be attached at the commencement of the suit, and kept as security for the plaintiffs' demand (Code, § 227; *Rinchev v. Stryker*, 26 How. Pr. 75; *Greenleaf v. Mumford*, 30 Id. 30; *Furman v. Walter*, 13 Id. 348; *McKay v. Harrower*, 27 Barb. 463; *Thayer v. Willet*, 9 Abb. Pr. 325; *Falconer v. Freeman*, 4 Sandf. Ch. 565; *Skinner v. Stuart*, 13 Abb. Pr. 442; *Pratt v. Wheeler*, 6 Gray, 520; *Wilson v. Forsyth*, 24 Barb. 105).

This action is rightfully brought for that purpose, and the judge and defendants' attorney err in treating this action as an ordinary creditor's bill, for the discovery of property after the return of an execution (*McElwain v. Willis*, 9 Wend. 561-567; *Beck v. Burdett*, 1 Paige, 307).

III. A contract between partners, which enables one of them to withdraw funds out of the reach of the joint creditors, is fraudulent (*Burtus v. Tisdall*, 4 Barb. 571; *Anderson v. Matby*, 2 Ves. Jr. 255). In equity, the partnership creditors have a right to follow the partnership property, as a trust, into the possession of all persons who have not a superior title (2 Story Eq. Ju. 689, sec. 1253; *Wilson v. Robertson*, 21 N. Y. 587). Neither Cook nor his assignee can have a title superior to the creditors of Howlett & Cook. A general assignment by an insolvent firm of their joint property, giving a preference to the creditors of the individual partners; or such an assignment by a partner of his individual property giving a preference to the creditors of the firm; or such an assignment making any provision or trust for the benefit of the assignor, is fraudulent and void (*Jackson v. Cornell*, 1 Sandf. Ch. 348; *Payne v. Matthews*, 6 Paige, 19; *Wilson v. Robertson*, 21 N. Y. 587; *Collomb v. Caldwell*, 16 N. Y. 487; *Wilder v. Keeler*, 3 Paige, 171; *Burtus v. Tisdall*, 4 Barb. 571; *Leitch v. Hollister*, 4 N. Y. 211).

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B. C. Thayer, for respondents.

I. The aid of a court of equity cannot be sought until every remedy at law has been exhausted (*McCollough v. Colby*, 5 Bosw. 485; *Dunlevy v. Tallmadge*, 32 N. Y. 459).

II. A creditor at large has no *status* in a court of equity. To enable him to its aid, he must have acquired a specific lien. If upon real estate, by filing a transcript of his judgment in the county where the real estate is situated. If upon personal property, by issuing an execution and levy thereunder by the sheriff. An execution must have issued on the judgment, and been returned unsatisfied (*Dunlevy v. Tallmadge*, 32 N. Y. 459; *North American Fire &c. Co. v. Graham*, 5 Sandf. 200). In this case, it does not appear that a levy was ever made under the executions issued, and no specific lien upon personal property is created without it.

By THE COURT.—DALY, F. J.—This is not an action brought by a creditor to enforce the collection of a judgment after he has exhausted his remedy at law, and in which the return of an execution unsatisfied is indispensable before he can invoke the equitable aid of the court; but it is an action by creditors who, in a suit brought by them to recover their debt, obtained an attachment against their debtor for fraudulently assigning his property, and who, having recovered judgment in that action, and issued execution upon it, bring the present action to set aside the fraudulent assignment, which is an obstruction to their collecting their judgment by a levy and sale of the debtor's property under the execution. By the issuing of the attachment, the plaintiffs acquired a lien upon the property of the debtor (*Falconer v. Freeman*, 4 Sand. Ch. R. 565; *Rinchey v. Stryker*, 26 N. Y. 75); and this lien, after the plaintiffs have recovered a judgment, entitles them to the equitable intervention of the court to set aside a fraudulent transfer of the property upon which the lien has attached, or any fraudulent obstacle in the way of enforcing the lien (*Greenleaf v. Mumford*, 30 How. Pr. 30); it being the design of the Code that the attachment should be a security for the satisfaction of the

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judgment, if the plaintiff recovers one (§ 227). To maintain such an action, it is not necessary that the execution should be returned, for, as was said by Chief Justice Nelson, in *McElvain v. Willis* (5 Wend. 561), it is not only not essential, but it would be fatal to the relief sought; and as was said by Senator Tracy in the same case, the execution may be the very instrument by which, when the court has removed the impediment to its operation, the judgment creditor will obtain the perfect satisfaction of his rights. Where a judgment creditor brings an action to set aside a fraudulent conveyance of real estate, which is an impediment to his obtaining a satisfaction of his judgment, an execution must have been issued (*North American Fire Ins. Co. v. Graham*, 5 Sandf. 200; *McCullough v. Colby*, 5 Bosw. 477), because the sheriff is not to proceed against the real estate if sufficient goods and chattels can be found to satisfy the execution—a fact which cannot be known until an execution is placed in the hands of the sheriff. In this case, however, an execution was not only issued, but the assignment covered all of the personal property of the debtor, and the equitable aid of the court is sought to remove the impediment created by the conveyance, that the personal property may be sold to satisfy the execution.

The next question is, whether the finding of the judge, that the assignment was not made with a fraudulent intent, can be sustained. The denial in the answer, for want “of knowledge sufficient to form a belief,” of the allegation in the complaint, that the firms of Howlett & Cook and of Twining & Cook were insolvent when the joint property belonging to each of these firms was sold to Cook, is not in the form prescribed by the Code. The denial must be of any knowledge or information sufficient to form a belief (*Edwards v. Lent*, 8 How. Pr. 28; *Blake v. Eldred*, 18 Id. 241; *Elton v. Markham*, 20 Barb. 349; *Hackett v. Richards*, 3 E. D. Smith, 13), and this fact, not being properly denied, is admitted. Treating this material fact then as admitted, it appears that Cook became the purchaser of the whole of the property of each of these firms, he at the time of the purchase being a partner in each firm. In his hands, the property thus acquired should have

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been applied to the payment of the partnership debts, instead of which he afterward made a general assignment for the benefit of creditors, in which he directed his assignee, the defendant Bolles, first to pay out of the proceeds of the property assigned certain debts owing by him individually, which was a diversion of the property to the payment of his individual debts, in fraud of the rights of the creditors of the firms of Howlett & Cook and Twining & Cook. Such an assignment is fraudulent (*Burtus v. Tisdall*, 4 Barb. 571; *Wilson v. Robertson*, 21 N. Y. 587; *Wakeman v. Grover*, 11 Wend. 187; *Anderson v. Mattby*, 2 Ves. Jr. 255; 4 Kent's Com. 64). The plaintiffs were creditors of the firm of Howlett & Cook, and the validity of their debt being established by a judgment, they were entitled to have this fraudulent assignment set aside, that they might have their judgment satisfied out of the property covered by the assignment; for when this impediment is removed, this property, whether regarded as partnership property, which the partnership creditors may reach, as primarily liable in the hands of Cook to the payment of partnership debts (Story's Eq. Jur. § 1253), or as the individual property of Cook, under the transfers made to him, it is equally liable to be levied upon and sold to satisfy their judgment.

The plaintiffs having shown that they were entitled to the equitable relief which they sought, the decision of the judge at the special term was erroneous, and the judgment must be reversed.

Judgment reversed.

Earle v. Cadmus.

MARY D. EARLE v. WM. H. CADMUS.

The delivery of a written receipt for goods by a common carrier is, *prima facie*, evidence that the goods were received by him; and his failure either to deliver, or to account for, the goods, is presumptive, in the absence of evidence to the contrary, that they were lost through his negligence.

A condition contained in a common carrier's receipt of a trunk, provided that he would not be liable for "an amount exceeding \$50 upon any article." Held, that the condition, conceding it to be valid, referred to the separate articles contained in the trunk; and their separate value not exceeding that sum, a recovery might be had for their aggregate value, although the amount exceeds \$50.

APPEAL by the defendant from a judgment of the Marine Court at general term.

The plaintiff was a passenger on the steamer Daniel Drew, from Albany to New York. On the arrival of the steamer at New York, one of the servants of the defendant, who was an expressman, came on board the boat, and applied to plaintiff to carry and deliver her baggage. The plaintiff gave the defendant's servant the check for her trunk, which she had received from the baggage master of the steamer, furnished him with the direction for the delivery of the trunk, and paid him his charges, thirty cents. At the same time, the defendant's servant handed to the plaintiff a printed receipt, which, after giving the number of the plaintiff's check, and a list of prices, contained the following clause:

"Cadmus Express will not be liable for merchandise received upon baggage checks, nor for an amount exceeding fifty dollars upon any article, unless agreed to in writing upon this card, and the extra risk paid therefor."

This action was brought to recover the value of the trunk, which was never delivered to the plaintiff. The value of the contents of the trunk was proved to be \$338, although no specific article of the contents exceeded \$40 in value. At the close of plaintiff's case the defendant's counsel moved to strike out the testimony of the plaintiff as to the value of the contents of the trunk, on the ground that she had been shown on

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her cross-examination not to be sufficiently acquainted with the value of such articles to enable her to testify on the subject. The court denied the motion.

The defendant then moved that the complaint be dismissed on the following grounds:

1. There is no proof that the defendant is a common carrier.

2. There is no proof that he has failed or refused to deliver the trunk in question, or its contents, to the plaintiff on demand.

3. There is no proof that the trunk or its contents, or any part thereof, were lost by any neglect on the part of the defendant or his agents.

4. There is no proof of any offer on the part of the plaintiff to return to the defendant the paper check or receipt, containing the contract between the parties, and delivered by the defendant's agent to the plaintiff's agent, on receiving her check for baggage.

The motion being denied, the defendant introduced evidence, showing absence of negligence. The court rendered judgment for the plaintiff for \$355.94.

Everett P. Wheeler, for appellant, cited on the point that defendant's liability was limited by the notice, *Cole v. Goodwin* (19 Wend. 257); *Harris v. Peckwood* (3 Taunt. 264); *Hinton v. Lock* (5 Hill, 437); *Blossom v. Champion* (37 Barb. 554); *Dorr v. N. J. Steam Nav. Co.* (11 N. Y. 485); *Moriarty v. Harnden's Express Co.* (1 Daly, 227).

George C. Barrett, for respondent, on the same point, cited *Nevins v. Bay State S. Co.* (4 Bosw. 225); and on the point that the defendant was a common carrier, *Sweet v. Barney* (23 N. Y. 335.)

BY THE COURT.—DALY, F. J.—The delivery of the receipt by the defendant's agent after receiving the check for the plaintiff's baggage, was sufficient evidence of a delivery of the trunk to the defendant for the purpose of carriage. If it could not

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be procured upon the steamboat on exhibiting the check for it, it was for the defendant to show it. As he offered no evidence upon that point, the presumption must be, that it was obtained, and as he did not deliver it, nor account in any way for its loss, the presumption must be, that it was lost through his negligence (*Arent v. Squire*, 1 Daly, 347).

The plaintiff was competent to testify as to the value of the articles contained in the trunk, which she had purchased herself, and both as respects them and the other articles, the testimony as to value, on the part of the other witnesses, was amply sufficient to warrant the finding of the justice on that point.

Without discussing the question, whether the defendant could, or could not, limit his liability, by the delivery of such a printed receipt to the plaintiff's agent, it is sufficient to say, that the condition was that the defendant would not be liable for an amount exceeding fifty dollars *upon any article*, and that no article contained in the trunk exceeded that amount in value; the highest valuation put upon any one article being \$40.

The proof as to the custom of express companies, in limiting their liability, was immaterial, as the defendant relied upon the special acceptance, contained in his printed receipt.

The judgment should be affirmed.

Salter v. Parkhurst.

WILLIAM H. SALTER v. SARAH PARKHURST.

Interest upon the separate items of a mutual running account will be allowed only from the time of the liquidation of the amount, in the absence of proof as to when the account was rendered, or that the amounts of the items were specifically agreed on, or that there was some proof of a custom to charge interest.

The District Courts in the city of New York have no jurisdiction of an action brought to charge the separate estate of a married woman for a debt contracted by her with reference to such estate.

After the removal of a cause from a District Court to the Court of Common Pleas (pursuant to Laws of 1857, ch. 844, § 8), the issues cannot be so changed that a subject not of original jurisdiction may be litigated against the consent of one of the parties. Hence it is error to allow the plaintiff, on the trial of a cause removed from a District Court, to amend his complaint by changing the demand against the defendant to one incurred by her as a married woman, and as a charge upon her separate estate.

THIS was an appeal from a judgment entered on the report of a referee in favor of the plaintiff.

The action was commenced in the Sixth District Court, for goods sold and delivered after issue joined; the defendant filed the requisite bond, and the case was removed to the Court of Common Pleas.

After removal, the parties pleaded anew, the plaintiff claiming for goods sold and delivered. The action was referred, and on the trial before the referee, plaintiff was allowed to prove, under defendant's exception, that at the time of the sale and delivery of the goods, defendant, although a married woman, had a separate estate, consisting of an income arising out of real estate, and that she agreed to pay for the goods out of such separate estate.

After giving such evidence, plaintiff was allowed by the referee, under defendant's exception, to amend his complaint by inserting the following allegation: That the defendant, at the time of the sale and delivery aforesaid of said goods, possessed a separate estate or income arising from real estate in the city of New York, and charged the same with the payment of the claim in this action.

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The plaintiff proved an assigned demand consisting of fourteen different items for goods sold and delivered at divers times, commencing May 20, 1855, and ending November 14, 1857, amounting in all to \$185.

The referee in his report, allowed plaintiff interest on the said several items separately, from the time of the sale to the date of the report. The referee also found that at the time of such sales and delivery, defendant was a married woman, and possessed a separate estate, and that she intended to charge and did charge such separate estate with payment of said items of merchandise, and that such indebtedness was a lien upon the separate estate and income of the defendant, and that plaintiff was entitled to the appointment of a receiver.

S. C. Conable, for appellant.

A. O. Salter, for respondent.

BRADY, J.—The District Courts of this city have not jurisdiction of action brought to charge the separate estate of a married woman for a debt contracted by her with reference to that estate, and an action brought in such a court cannot, after removal to this court, be changed in its character by this court, or by a referee. Whatever opinion may have been entertained on this subject prior to that decision, I think the case of *Smith v. White* (23 N. Y. Rep. 572) determines that the issues created by the pleadings in the court below, are those to be tried on its removal to this court, and that it continues in all respects to be an action in a District Court, the trial of which is to be had in this court. If it be not so, then an appeal could be taken to the Court of Appeals, without an order allowing it to be done by this court. The removal cannot be made until after issue joined (Act 1857, § 3, subd. 3), and the issues cannot be so changed that a subject not of original jurisdiction may be litigated against the consent of one of the parties. For these reasons I think the referee erred in allowing the complaint to be amended by changing the demand against the defendant, to

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one incurred by her as a married woman, and as a charge against her separate estate.

Judgment should be reversed.

CARDOZO, J.—Reading the evidence in this case in the most favorable way in support of the referee's report, the case presents the following facts: On the first day of January, 1849, Albert Salter, the assignor of the plaintiff, was indebted to the defendant in the sum of \$200, for money borrowed, for which, on that day, he made his promissory note bearing interest. On the 6th of February, 1852, he made a payment of \$100, leaving then due to the defendant, of principal and interest, \$142.20.

In 1854, and thence at intervals down to November 14, 1857, the defendant ordered certain work to be done for, and goods to be delivered to, her husband and her son, for which she promised to pay out of her separate estate, it being understood that so far as it would extend, the amount should be applied in reduction of her claim upon the note. She ordered goods and work amounting in value to the sum of \$185. The referee bases his report upon the theory that this state of facts constituted a mutual and current account between the parties, and that, therefore, the statute of limitations, which each side has pleaded, does not apply either to the note or the items for work done and goods delivered on the promise of the defendant more than six years before the commencement of the suit.

Assuming this to be correct, I still think it clear that the referee's report should not stand. I do not stop to consider whether his view of the nature of the account be correct, because if it be not, the note in favor of the defendant, and the whole account in favor of the plaintiff, except the sum of \$18 and interest, would be barred by the statute of limitations, and the referee's report would then be wrong. But I am of opinion that, conceding the account to be a mutual running one, the referee has erred in making and stating it. He has allowed the plaintiff interest on each item from its date in the account, without any proof either as to when the account was rendered, or that the price of the articles was specifically agreed upon, or that

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there was any custom to charge interest. Under such circumstances, interest is recoverable only from the time the amount is liquidated (*Esterly v. Cole*, 3 N. Y. 502). A demand for payment was testified to, but the time when it was made was not proven, and therefore interest could only be allowed from the commencement of the suit.

Judgment reversed, and new trial ordered. Costs to abide the event.

EMIL REINHARD v. THE MAYOR, ALDERMEN, AND COMMONALTY
OF THE CITY OF NEW YORK.

A municipal corporation is liable to one who, without fault on his part, is injured by falling through a defective grating in a public sidewalk, where the defect has existed long enough to imply notice of its existence.

The liability of the corporation, in such a case, is not affected by the fact, that if its ordinances had been complied with, by the owner of the property fronting on the sidewalk, the injury would not have occurred, for it was the duty of the corporation to enforce its ordinances, and the public may rely upon such enforcement, and not seek the persons who violate them.

The liability of the city of New York, for the defective condition of a public street, is not affected by the fact that the executive duty of enforcing its ordinances by inspection of streets, and reporting violations of them, is vested by law in the Metropolitan Police, an independent body, and not subject to its authority or control. The general control of all public streets is vested in the city corporation, by law, and the right which it has to pass ordinances, and to appoint a city attorney to enforce them, carries with it the power to make those ordinances effectual by the appointment of the necessary servants to accomplish the object.

APPEAL by the defendant from a judgment at trial term, entered on the verdict of a jury.

The action was brought to recover damages for injuries sustained by the plaintiff from his falling into a coal hole, in the sidewalk, opposite to the premises 144 Thompson street, in the city of New York. It appeared that the plaintiff, while passing along the sidewalk, in the early

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part of the evening, stepped upon one edge of a coal slide cover, which protected a vault under the sidewalk. The cover turned over upon being stepped upon, and one of the plaintiff's legs slipping through, the whole weight of his body fell upon the upturned edge of the cover, severing the urethra, and otherwise seriously injuring him.

It appeared that coal slide covers of the kind in question are now generally disused, being thought unsafe. The covers now commonly used are cast-iron covers constructed with spikes which fasten into the pavement. It also appeared that the pavement into which the cover in question was set, was sandstone, which had worn away and rendered the cover more easily displaced, which would not have been likely to occur had the pavement been of blue stone. There was a conflict of evidence as to whether the cover in question was fastened by a chain below, or whether it had rusted off.

On a denial of a motion to dismiss the complaint, the court (DALY, F. J.), charged the jury as follows:

The first question in this case is whether the corporation are liable to pay for this injury in the shape of damages, and that depends on the question whether it was occasioned by their negligence. That is to be determined by the extent of their duty, and whether the intermission of that duty in this particular case, was the cause of this accident. The corporation are bound to keep the streets and avenues of the city in such repair that they may be safely traveled when open for use, and if they negligently suffer them to get out of repair, they are liable for any injuries that may happen through that negligence. When the words "public street" are used, they are used as a compound word, and include the sidewalks, which are more used for pedestrian travel than the portion of the street lying between them. Every thing on which the passenger travels is a part of the sidewalk. Every thing which has been allowed by public regulations to be traveled on is part of the sidewalk. It is a convenience to occupants of houses to be able to communicate from the sidewalk to the vault below, and for that purpose an aperture is allowed under certain securities which have been defined by the ordinances that have been read to you, and

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when these are complied with or conformed to, there can be no negligence on the part of the corporation, or on the part of the owner or occupant of the premises. The aperture, which is used generally for the purpose of receiving coal, has an iron cover, which may be removed when the opening is needed for use, and replaced when that service is over. It is secured in the most common mode by a chain fastened below, or, in more recent cases, by the fitting of the cover, which dispenses with the necessity of a chain. However, as a matter of common use throughout the city, the old grating is still employed, chiefly because it admits light and air into the vault below, and for that reason is, when it is equally well secured, better than the solid plate. It has been commonly preferred, and in use is equally safe.

Now, it is the duty of the corporation to see that these gratings or covers are secure, and, in connection with that duty, the corporation may impose any regulation it considers necessary with regard to them or to the public streets. It may exercise any control it may think proper in the shape of an ordinance, and its officers, whether in the street department, or in any other department, may require such conformity thereto on the part of owners of dwellings, and on the part of those who use the public streets, as may secure the public safety. Whatever may conduce to that, overrides all other considerations; for that is a paramount object, and the corporation, having this duty imposed on it, and being invested with ample powers, is responsible, when, by their negligence, injury occurs. Of course the corporation is not liable where no reasonable exercise of vigilance on their part could advise them of the cause which produced the injury; which I may illustrate by a case tried before me some years ago, in which I held that the corporation were not responsible for the gross negligence of a tenant, whose servant had left a grate opening but partially covered, and that it would be unreasonable to hold them liable for damage under such circumstances. They are not supposed to keep an amount of watchfulness that will enable them to detect every instance in which the proprietor or occupant of property has been guilty of negligence of this description; but if the aper-

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ture of a vault has been suffered to fall into decay, until the grating has become notoriously unsafe by reason of such neglect, the responsibility rests with the corporation. It is impossible that a defect of this kind should exist without the knowledge of some one. This insecurity in the covering of vaults in sidewalks, is a matter of common occurrence. I have frequently felt called upon to stop and have a vault covered; and when a policeman sees a vault uncovered, it is to be taken for granted that he will communicate with the occupant of the building, and enforce its being secured.

This case, therefore, turns upon the question, whether the covering of this vault was one unfitted for use; whether it had worn away by attrition in the progress of time, so that the bed, which is alleged to have been of brown stone, was no longer fitted to retain the iron grating with security, or to prevent it from turning round, or up and down. If that were the case, it was of no consequence what chain was attached to it below; for the chain would only keep it steady in a particular part, and it might revolve, on its axis. If, however, it arose entirely from the fact of its not being fastened below, then it would be a case of negligence on the part of the owner of the building; if not, then the question is, whether it was of such long standing, and so obvious in its character, that the corporation must have known it through the officer whose duty it is to ascertain the condition of the public streets, and to see that they are secure for the safe transit of travelers. That is a question of fact for you to determine.

The defendants' counsel asked the court to charge the jury as follows:

1. That the defendants, having passed resolutions regulating the manner in which gratings should be constructed and secured, and vaults covered, have discharged their entire duty, and are not liable in this action.

The court refused so to charge, and defendants' counsel excepted.

2. That unless the jury believe from the evidence, that the defendants had a direct notice of the defective condition of the grating and neglected to repair it, they are not liable.

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The court refused so to charge, and the defendants' counsel excepted.

At the request of defendants' counsel, the court charged that, unless the jury believed from the evidence that the grating was, at the time of the accident, and had been out of order for such a length of time as reasonably to imply notice to the defendants of its defective condition, the defendants were not liable; and on a like request, the court charged that the defendants were not liable for injuries resulting from a violation of their ordinances.

On a request of defendants' counsel to charge that the police are not the agents or servants of the defendants, and not responsible to them in any degree, the court said: That is abstractly correct. The corporation has not the power over the police which it has over its usual agents. Neither has it over the board of education, and several other bodies which have been made independent of it; nevertheless the municipal authorities are clothed with general powers in respect to the public streets. The corporation can by ordinance impose duties upon the police just as it can upon its agents. It can direct that the streets shall be watched in a particular way.

The case was then submitted to the jury, and they rendered a verdict for \$1,000 in favor of the plaintiff.

The defendants appealed to the general term from the judgment entered upon the verdict.

Richard O'Gorman and David E. Dean, for appellants.

Malcom Campbell and Thomas H. Hill, for respondent.

BY THE COURT.—BRADY, J.—The plaintiff in this action was severely and permanently injured by the upturning of a coal slide grating, which was neither fastened by a chain nor securely resting on its bed. There was evidence to show that it had been insecure for some time prior to the accident, and also evidence that improvements had been made in gratings or covers, which made them, if not absolutely secure, much more so than the one upon which the plaintiff stepped, and which was

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the cause of his injury. The defendants claim to be released from liability, because—

1. There was no proof of any notice to them of the insecurity or defectiveness of the grating.

2. That they had enacted an ordinance, which, if complied with, precludes the possibility of such an accident as that from which the plaintiff suffers.

3. That they are not liable for a violation of their ordinances.

4. That the executive duty of enforcing those ordinances, by inspection of the streets and reporting violations of them, is vested by law in another and independent body (the Metropolitan Police), who are not subject to their authority or control; and,

5. That the accident arose from the negligence of the occupants of the house in front of which this grating was located.

There is nothing formidable in this array of objections. The defendants are vested by law with the control of the streets and sidewalks of this city, and it has been held, frequently, that it is their duty to keep them in such condition that they may be safely traveled at all hours, their liability for injuries sustained depending, nevertheless, in some instances, either upon express notice of an existing danger, or proof of its existence for a period long enough to justify the presumption of notice. These rules are so familiar, that it is not considered necessary to cite the cases and laws by which they have been established. Possessing the control suggested, the making of vaults, and the use of vault gratings or covers, is also entirely under the control of the defendants, and they have, by their ordinances, determined by what permission, and in what manner, vaults shall be made, and the grating or covers to be used over the openings in the sidewalk communicating with them (see Revised Ordinances of 1845, chap. 18, p. 251). It will be seen, on examination of these ordinances, that no vault is to be built without permission, in writing, from the Croton Aqueduct Board; that the opening to it on the sidewalk must be within a certain distance from the outside of the curbstone of the sidewalk, or within twelve inches of the coping of the area in front of the house to which the vault shall belong, under certain penalties

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prescribed, violations of which involve no consequences except liability for the penalty (*Brown v. The Buffalo & State Line R. R. Co.* 22 N. Y. 191), and do not, therefore, relieve the defendants from liability for injuries resulting from such violations. The use of the power possessed by the defendants being exercised, and in a manner which is attended with danger, imposes upon them the highest obligation to secure the safety of the public. It may be said with propriety, although it is not necessary for the purposes of this appeal so to determine, that, by granting permission to make openings in the sidewalk, and to use gratings or covers, the defendants are principals, and the act chargeable upon them as such. They delegate a power by such permission, which is to be employed by another, with their authority—*facit per alium, facit per se*. Without asserting this, however, to be a legal consequence of their permission, there is no doubt, as stated, that by permitting the street to be used for a hazardous purpose, they are required to exercise the greatest caution and vigilance. The evidence in this case shows conclusively that such caution and vigilance have not been employed. The grating which the owner of the house was permitted to use was not the best that could be procured, and it was not, in all respects, the best of its kind. It rested upon a brown stone bed, which was not as well adapted for the purpose as a blue stone, the former being softer and more liable to wear away—which was illustrated by the condition of the stone on which the grating in this case was laid. Of this, the defendants must be presumed to have notice. When the permission is given, the defendants must see that all the safeguards declared and known shall be adopted, and, as long as a thing dangerous in itself is employed, to see to it that it shall be so employed that no person may be injured. In using the thoroughfares of this city, the public are not called upon to examine ordinances, do police duty, or take the place of the employees of the defendants. They have the right to assume that they may safely traverse them at all hours, exercising only that degree of caution which every reasonable person is supposed to observe. They may not rush into danger with impuni-

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ty, or set at defiance the obligation to regard their own personal safety, upon an assumed infallibility of the defendants in reference to the street ; but, where there is no apparent danger, they are justified in relying upon a safe enjoyment of the highway. There was no apparent danger to the plaintiff, and he was entirely free from negligence. It appears, therefore, in this case:

1. That the grating or cover of the vault opening was insecure, and had been for some time.

2. That a safer covering was in use.

3. That the plaintiff was injured while in the legal enjoyment of the highway ; and,

4. That he was free from negligence.

These facts are sufficient to create a liability on the part of the defendants. If the ordinances, as they say, when complied with, are sufficient to prevent such casualties as complained of here, why do they not enforce them ? We are not to stop here to inquire who is to report the violations of ordinances, inasmuch as that cannot in any way affect the plaintiff's rights. If he had known of the defective covering on which he stepped, he would be without a remedy, and would have been guilty of negligence, not only in regard to his legal rights, but toward the community, if he failed to inform the authorities. The defendants must be held to the responsibility growing out of obstructions or excavations in the street, unless excused by want of express or constructive notice, notwithstanding their ordinances in reference to such obstructions or excavations. The public may rely upon their enforcement, and not seek the persons who violate them. The defendants occupy, except in cases already suggested, the relation of insurers against injuries arising from a proper use of the streets as such. If the metropolitan police are not, and cannot be, required to report violations of law, then, as a co-ordinate branch of the city government, it is as a department very defective. There is no proof of this fact, however. It cannot be regarded as a legal proposition, and it is not to be assumed that the police commissioners relieve the force from the discharge of such duties. The corporation attorney is the officer of the defendants upon

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whom the duty devolves to prosecute for violations of the ordinances; and the defendants are bound to see that the necessary force is employed to make his trust available, at least in reference to such violations as endanger the public safety. The right to pass ordinances, and the appointment of an officer to enforce them, carries with it the power to make those ordinances effectual; and if the police cannot be instructed and required to make examinations, and report to the proper person, then the defendants should have the necessary servants to accomplish the object named. I can discover no reason why this judgment should not be affirmed.

Judgment affirmed.

CHARLES C. SCHMIDT v. CHARLOTTE COSTA.

The amendment of the Married Woman's Act, passed in 1862 (Laws of 1862, ch. 172, §§ 7, 8), by which the word "purchase" was then, for the first time, introduced into the statute, did not enlarge the powers or the liabilities of married women, so as to make a married woman, not carrying on any trade or business, and not having any separate property, liable for goods sold and delivered to her.

APPEAL by the defendant from a judgment dismissing the complaint. The facts fully appear in the opinion of the court.

BY THE COURT.—CARDOZO, J.—The plaintiff seeks to make the defendant, who is a married woman, not carrying on any trade or business, and not having any separate estate of her own, liable for some household furniture which he sold and delivered to her. So far as this claim rests upon the statutes of this State respecting married women, I think it cannot be supported. It was not pretended on the argument but that down to the passage of the Act of 1862 (Laws of 1862, p. 343) the authorities were against the defendant's liability (*Barton v. Beer*, 21 How. Pr. R. 309; *Brown v. Herman*, 14 Abb. Pr. R. 394), but it was

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supposed that the word "purchase," which was then for the first time introduced into the statute (§§ 7 and 8), effected a change. I think it is not so. The property which is to be her separate estate, the transactions in which she may engage for her sole benefit, and the manner in, and the circumstances under, which she can acquire additional property, are regulated by other sections of the statute which have not undergone any change since the decisions above referred to. The seventh section confers no additional right, either to contract or to acquire (except as the result of a suit) any property, but simply authorizes her to sue and be sued, and must be read in connection with the previous sections which regulate of what her estate shall consist, and how she may acquire it, and under what circumstances she may contract respecting it.

This disposes of the only question in the case.

The trial seems to have been conducted and decided below, upon the theory that the liability of the defendant must depend entirely upon the statute. The proof, although I imagine from the evidence given that the defects could have been supplied, was not sufficient to fully present the point, and therefore it is unnecessary to discuss whether a case might not have been made in which the defendant could have been held liable at common law (see a review of many of the authorities in *Gregory v. Paul*, 15 Mass. 31).

The judgment must be affirmed, with costs.

Hallagan v. Herbert.

MICHAEL HALLAGAN v. DANIEL HERBERT.

The notice to create a lien (under the mechanic's lien law of 1855) must be duly verified in the same manner as a pleading, and a complaint, in an action to foreclose a mechanic's lien, which contains no averment that the notice to create the lien was verified, is demurrable, as not stating facts sufficient to constitute a cause of action.

APPEAL by the defendant from a judgment granted on a demurrer to a complaint as frivolous, in an action to foreclose a mechanic's lien. The grounds of the demurrer appear in the opinion of the court.

BY THE COURT.—DALY, F. J.—The statute declares that the notice to create a lien shall be verified before filing, in the same manner as a pleading is required to be verified by the Code (amendatory act of April 13, 1855). We held, in *Conklin v. Wood* (3 E. D. Smith, 662), that unless the plaintiff shows a valid claim under a lien *duly filed*, he cannot succeed in an action under the statute. In that case, the judgment was reversed, because the notice served upon the county clerk was not verified in the manner prescribed by the Code. In the complaint in the present case, there is no averment that the notice was verified at all, whereas the verification of it before filing is essential to the creation of the lien. The demurrer is upon the ground that the amended complaint does not state facts sufficient to constitute a cause of action; and it does not, for the filing of a notice verified in the manner above stated, is one of the facts essential to the creation of a lien, and to the existence of a cause of action. The want of a verification, or of a sufficient verification, of the notice is, as was said in *Conklin v. Wood*, a defect which goes to the whole claim, and cannot be amended.

The judgment should therefore be reversed.

Gore v. The Norwich & New York Transportation Company.

CARLOS GORE v. THE NORWICH & NEW YORK TRANSPORTATION COMPANY.

The fact that a passenger by the defendant's steamboat, at the time of paying for his passage and a state-room, wore his overcoat (which he afterward deposited in his state-room, whence it was stolen without fault on his part), cannot be regarded as indicating an *animus custodiendi* on his part, to the exclusion of the carrier, so as to relieve the latter from liability for the loss.

The granting, for compensation, of the use of a state-room, in the absence of notice to the contrary, is a designation of the place in which the passenger may place his ordinary baggage, but not to the exclusion of the carrier, inasmuch as the whole vessel is in the possession and under the control of the carrier, and the *animus custodiendi* of the passenger, as to wearing apparel in temporary use, ceases when the article is placed in the state-room.

The proprietor of a steamboat is liable for wearing apparel stolen from a passenger's state-room, in the absence of negligence on the part of the latter.

APPEAL by the plaintiff from a judgment of the First District Court, dismissing the complaint. The facts which appeared upon the trial are fully stated in the opinion of the court.

Miller & Peet, for appellant.

J. W. C. Leveridge, for respondent.

BY THE COURT.—BRADY, J.—The plaintiff, on the 30th December, 1865, took passage for Norwich in the defendant's steamer "The City of Boston." He paid the fare, and in addition secured and paid for a state-room, of which he was given the key. He went to his state-room door, opened it, and taking off his overcoat, hung it up in the room, at the same time also leaving his carpet bag. He then left the room, and locked the door. He then spent some time in walking about the saloon of the steamer, and while thus engaged discovered the door of his state-room open, and on entering the room also discovered that his coat was not there. He immediately called

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the waiter in charge of the saloon, and a search was made for the coat, but it was not found. The justice, on these facts, found for the defendants. I am unable to distinguish this case in principle from that of *Mudgett v. The Bay State Steamboat Co.* (1 Daly, 151). We held in that case that the defendants were liable for the loss of a valise deposited in the plaintiff's state-room by him, and of which he had the key, such loss not having occurred through his negligence. After depositing his valise, he locked the door of his state-room, and while he was temporarily absent therefrom, it was stolen. We held, also, that the mere supervision of baggage by the owner, or possession of the means of entering and using the place of its deposit furnished by the defendants did not, in the absence of negligence on the part of the owner, discharge the carrier from liability in case of loss. That there must exist the *animus custodiendi* on the part of the traveler, to the exclusion of the carrier, as in the case of *Towers v. The Utica & Schenectady R. R. Co.* (7 Hill, 47), or such negligence on the part of the former as to charge him with the loss through his own fault. The case in 7 Hill, 47 (*supra*), was one in which it appeared that the overcoat lost was not delivered to the defendants, and that it was lost by the negligence of the plaintiff. In this case, the plaintiff placed his overcoat in the state-room with the rest of his baggage, and locked the door. In doing so, he placed it in the possession of the defendants, and was not guilty of any negligence which resulted in or contributed to the loss. He had a right to do what he did, and the exercise of a right in a lawful manner creates no burdens. The defendants here disclaim liability, upon the ground that the plaintiff's overcoat, being in use at the time the state-room was secured, was not delivered to them, and was not intended to be; that the plaintiff was, and must be regarded as having continued to be, in the actual custody of his overcoat, to the exclusion of the defendants, and therefore that no delivery to them of it was made. The liability of an innkeeper has been likened to that of a common carrier, although if, in an action against the former, it appears that the loss complained of resulted from the claimant's negligence, the action cannot be maintained (*Purvis v. Coleman*, 21 N. Y.

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111); and the baggage of a passenger entrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods which are entrusted to a common carrier (*Merrill v. Grinnell*, 30 N. Y. 594). In *Richmond v. Smith*, (8 Barn. & Cres. 10), Lord Tenterden said, in reference to a particular place of deposit for goods at an inn, that "if it had been intended by the defendant not to be responsible unless the guests chose to have their goods placed in their bed rooms, or some other place selected by him, he should have said so" (see *Wilson v. Halpin*, 1 Daly Rep. 496, in which we declared the 'right of the innkeeper to insist upon the guest placing his goods where directed); and Bayley, J., said that an innkeeper's liability very closely resembled that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated when the guest chooses to have the goods under his own care (see approval of the preceding case in *Piper v. Manny*, 21 Wend. 284). The state-rooms on board of the defendant's boat are similar to the rooms at an inn. They are not furnished, however, to the traveler on payment of the passage money, or payment of the general price for transportation. They are a specialty, to possess which an extra sum must be paid, and they enable the traveler to enjoy greater privacy and comfort during his transit, being provided in that mode with a place in which he may put his baggage, and employ both at pleasure, incurring only the obligation so to use the room, if he desire to hold the carrier responsible for any loss that may happen, that he be not guilty of negligence. Granting, for compensation, the use of a state-room, in the absence of notice to the contrary, is a designation of the place in which the traveler may put his ordinary baggage, but not to the exclusion of the carrier, inasmuch as the whole vessel is in possession of the carriers, and subject to their control. If similarly deposited at an inn, it would be regarded as *infra hospetium*, and, as we have seen, the obligation and duties of carrier and innkeeper have been declared to resemble each other. The inn is subject to the control of the keeper, and the vessel in this case, as already stated, was under the manage-

ment and control of the defendants. In providing thus for passengers, the carrier must be supposed to contract in regard to personal clothing with reference to its known use to be put on and taken off and changed to suit the comfort or whim of the owner. To hold that wearing an overcoat, when a passage was taken on board of the defendants' boat, and a state-room was secured, imposed the obligation upon the plaintiff to hold that article of wearing apparel entirely in his possession, whether in or out of his state-room, seems to be a legal conclusion that cannot reasonably be entertained. If the traveler, while using any article of dress, such use establishing the *animus custodiendi* for the time being, loses it, it is right that the carrier should be released from liability. But if, after it shall have been used temporarily, as in this case, it be restored to the locality provided for such things generally, or specially as in this case, the use ceases—the *animus custodiendi*, in fact and in law, ceases, and the custody reverts to the carrier. A carrier of passengers for hire undertakes that duty with reference to the reasonable habits and customs of men, for the observance and gratification of which improvements are constantly being made, more particularly on steamboats such as used by the defendants, the appliances and conveniences of which assimilate closely to the comforts and conveniences to be found on the land. The result of these views must be that the plaintiff did not, by wearing his overcoat when he secured his passage, by that act, under the circumstances disclosed by this case, declare his intention expressly or impliedly to retain its custody to the exclusion of the defendants during his transit, and not having done so, he was entitled to recover in this action. Having secured and paid for his state-room, he had a right to use it in the manner he did, and by putting his overcoat in it, not having been guilty of negligence, he placed it in the custody of the defendants, and threw upon them the obligation to protect it from thieves.

The judgment should be reversed. Judgment reversed.

Kennedy v. Thorp.

FELIX V. B. KENNEDY, *as Receiver, &c.*, v. GOULD H. THORP
and WATERMAN C. BRADLEY.

It is not essential to state, in an affidavit to obtain an order for the examination of a judgment debtor, in supplementary proceedings upon a judgment in a court of record, that the judgment has been docketed in the county clerk's office. It is otherwise where the proceedings are founded upon a judgment obtained in a District Court of the city of New York.

A receiver of the property of a judgment debtor, appointed in supplementary proceedings, is not estopped from proving that the debt for which the judgment was obtained was fraudulently incurred, by the fact that the judgment creditor waived the fraud by bringing an action for the debt.

Fraudulent representations of solvency, by which one induces credit to be given him just before making a general assignment, are evidence to indicate a general scheme of fraud, of which the assignment was a part.

APPEAL by the defendants from a judgment at trial term.

The action was brought by the plaintiff, as receiver of the goods and property of Waterman C. Bradley, to set aside a general assignment, as having been made with the intent to hinder, delay, and defraud creditors. The plaintiff was appointed receiver, in proceedings supplementary to execution issued upon a judgment, which was recovered against Bradley at the suit of the Glen Cove Starch Manufacturing Company.

Upon the trial, the regularity of the plaintiff's appointment was raised, it being objected, among other things, that the affidavit upon which the order for the judgment debtor's examination in the supplementary proceedings, in which plaintiff was appointed, did not show that the judgment of the Glen Cove Starch Manufacturing Company was ever docketed in the county clerk's office.

The court (CARDOZO, J.) rendered judgment for the plaintiff, delivering the following opinion:

CARDOZO, J. 1. I am of the opinion that there is nothing upon the face of the assignment which invalidates it.

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2. The objection that the complaint does not show that the remedy at law has been exhausted, because it is not averred that the judgment was docketed in the county clerk's office, might have been good upon demurrer; but, as the defendants have seen fit to go to trial, and their own proof shows that the assignor had not any real estate, I think the pleadings should, under the Code, be conformed to the fact, by an allegation excusing the omission to docket the judgment in the county clerk's office, similar to the one suggested by the Chancellor, in *Ontario Bank v. Schermerhorn* (10 Paige, 109), which, I think, would be sufficient to sustain the bill.

3. Upon careful reflection, I am constrained to find, as a matter of fact, upon all the evidence, that the assignment is fraudulent; that the purchases were made upon false representations, and with intent to dispose of the property for the assignor's own benefit; and that the assignment was made in pursuance, or execution, of such intent. I think all the evidence received is competent, as bearing upon the intent with which the assignment was made.

4. There must be judgment for the plaintiff, and the assignee must account and pay over to the plaintiff, who will be authorized to pay the creditors whom he represents. A reference will be ordered to carry the judgment into effect.

From this judgment the defendants appealed.

D. M. Porter, for appellants.

William H. Dickinson, for respondent.

By THE COURT.—BRADY, J.—It was not necessary to state in the affidavit that a transcript of the judgment had been filed in the office of the county clerk. The judgment of which the supplementary proceedings were predicated had been obtained in this court. The Code (§ 292) does not make that a prerequisite in such a case. When the proceedings are founded upon a judgment obtained in a district court in this city, it is essential to jurisdiction (Code, § 68). The cases upon this question, cited by the defendants' counsel, related to judgments in justices'

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courts which affected only the personal property of the debtor, *ex proprio vigore*, and the judgments pronounced were based upon that distinction. Were it otherwise, it is shown that the debtor had no real estate, and the amendment allowed by Judge Cardozo remedied the defect. The Glen Cove Starch Manufacturing Company could have proceeded against the defendant Bradley, to recover the goods in specie, or their value, in an action founded upon the fraud alleged to have been committed, or they could waive the tort, affirm the sale, and sue as for goods sold and delivered. It is conceded that their judgment was recovered upon an alleged sale and delivery of the goods, and the right to proceed, as for a tort, was waived and merged. Although such was the legal result of the form of action adopted by them, it did not prevent them from assailing the assignment, on the ground that it was made with intent to defraud creditors. The gravamen of the two causes are entirely different. The fraudulent representations by which they were induced to sell their goods were proved for the purpose of showing an intent to accumulate property for a fraudulent purpose, in conjunction with similar transactions, but not by them as suitors, but by the receiver, who represents the interest of the creditors as well as those of the debtor, and who is a trustee for all parties (*Bostwick v. Beizer*, 10 Abbott Pr. 197; *Porter v. Williams*, 9 N. Y. 142; *The Chautauque County Bank v. White*, 6 N. Y. 236). This action cannot be regarded as commenced by the Glen Cove Starch Manufacturing Company. The receiver takes the property of the debtor if the assignment cannot be sustained, inasmuch as the assignee has no title to it or its proceeds. The fraudulent conveyance, in such an action as this, may be annulled, and the creditor permitted to proceed to a sale upon his execution, or the property sold, and the proceeds applied to the payment of debts, according to their legal or equitable priorities (cases, *supra*). It was the duty of the receiver, if the facts and circumstances warranted it, to essay to get the assets of the debtor, by attaching an assignment which he believed was fraudulently made to hinder and delay the creditors in the collection of their debts. The plaintiff is, therefore, *rectus in curia*. There is no doubt that the assignor,

Bradley, made purchases when he was insolvent. He had a right to do so. It was not evidence *per se* of a fraudulent intent, though it was a fact to be considered with reference to the general design which he had in view. His false representations, however, were wholly unjustifiable, having been addressed on the subject to which they related (*Nichols v. Pinner*, 18 N. Y. 295; *S. C.* 23 N. Y. 264). It may also be said that he had a right to make an assignment preferring creditors, but, nevertheless, the exercise of both rights may have been with the intent to defraud. An act lawful in itself may be done with a fraudulent intent, and the facts and circumstances surrounding the defendant militate much against his honesty. He not only purchased largely within a short time before he made an assignment, but obtained many of the goods bought on representations as to his solvency which were false. The greater part of the goods thus obtained were shipped, and the creditor prevented, therefore, from reclaiming them. His purchases, within six weeks prior to the assignment, were more than enough to pay his confidential debts, but so little in excess as to justify the conclusion that his scheme was to get goods enough to protect that class of creditors, and then to assign. His explanation of the causes of his failure, I admit, was plausible. He lost by stock operations, and by the failure of his brokers, whose notes he had to take for the margin deposited with them, and his credit was seriously injured by the conduct of some of his creditors, who, by offering his paper at large discounts, depreciated his ability to meet his engagements. These causes precipitated, he says, the assignment, which he had not designed to make until almost immediately before it was executed. It appears, however, that his stock operations were based upon money which was not part of his capital, and that he had made gains, though not sufficient to cover the losses and margins withheld. These explanations, however, are not sufficient to remove the effect of his extraordinary conduct in making the purchases he did by false statements. I should be much disposed to regard his assignment as honestly executed, were it not for this element. It was that, indeed, which justified his creditors in assailing his credit, and, when it was assailed, he could not defend it. It is

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true that he says he did not know that he was not solvent, but that cannot avail him. When inquired of on that subject, in reference to a purchase on credit, he was bound to know it. If a man may be excused, by a supposition or belief that what he says is true, under such circumstances, with all the means of knowledge at hand, and particularly when it relates to his own personal affairs, then the remedies for fraud accomplished would be valueless, and commercial transactions rendered very insecure in their results. The law does not, however, countenance such conduct. Whether a party misrepresenting a material fact, knows it to be false, or makes the assertion without knowing whether it be true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false (1 Story Eq. § 193). This proposition was adopted by the Court of Appeals in *Bennett v. Judson* (21 N. Y. 238). The defendant, Bradley, fraudulently obtained goods with the intention of transferring them, or their proceeds, for the purpose of securing a certain class of creditors, to the exclusion of others, and the two things formed one general design. If he had returned to the sellers, from whom his recent purchases were made, their goods, or some portion of the proceeds, his conduct would have secured a more favorable consideration, and an honest intent, in assigning the rest of his assets, might have been gathered from all the circumstances then disclosed. I do not arrive at this conclusion entirely free from doubt, but I should entertain greater doubt of the propriety of upholding the assignment.

I think the judgment should be affirmed.

Judgment affirmed.

Spadone v. Manvel.

AMADEE SPADONE v. CYRUS MANVEL.

A principal cannot be charged, by a notice to his agent, of a transaction had between the latter and a third person, unless the transaction in question was within the scope of the agent's authority; and whether or not the transaction was within the scope of the agent's authority is a question of fact for the jury upon conflicting evidence.

Hence, in a case where there is no proof of express notice to the principal, it is error for the court to submit to the jury the question of the principal's knowledge of the transaction, without, at the same time, instructing them that, unless they find that the agent had acted in the transaction within the scope of his authority, the agent's knowledge was not the knowledge of the principal, and the notice he had of his own acts was not notice to his principal.

Where there is no evidence upon which even a presumption arises which would justify a jury in finding that the defendant had ratified the act of his agent, it is error for the court to submit to the jury whether or not there was any ratification.

The mere fact that a transaction between defendant's agent and a third person was entered in books kept by the agent, raises, at most, only a presumption of notice to the defendant.

APPEAL by the defendant from a judgment of the Marine Court at general term.

This action was brought to recover the value of two watches, alleged to have been sold to defendant, through Bray & Dauchy his agents.

It appeared, on the trial, that the defendant was a manufacturer of silver-plated ware, and that he owned the stock of goods, at No. 41 Maiden Lane, and that Bray & Dauchy, who carried on business there, were authorized by defendant to sell the stock of goods and to replenish the stock as far as was necessary to sell off his goods, but they were not authorized to buy jewelry or watches, such goods not being kept for sale or bought by that store. The watches in question were delivered by the plaintiff at No. 41 Maiden Lane, to go with a line of silver-plated goods, which Bray & Dauchy were to send to South America "on consignment" through one Clark. Bray & Dauchy credited the plaintiff and debited Clark with the

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price of the watches in their books. The defendant never inspected these books and had no supervision over them, but settled his accounts with his agents, by means of accounts rendered by them to him, and knew nothing of the transaction till the commencement of the action. Clark sold the watches but never remitted the proceeds to Bray & Dauchy, or to the defendant, but gave a note for part of the price of the whole shipment which is still unpaid. At the time of the delivery of the watches and until long afterward, the plaintiff did not know that Bray & Dauchy were agents for or in any wise connected with the defendant.

The exceptions to the charge of the justice before whom the case was tried are stated in the opinion of the court. The jury found a verdict for the plaintiff, which was affirmed by the general term of the Marine Court. The defendant appealed to this court.

Samuel Jones, for appellant.

G. R. and T. D. Pelton, for respondent.

BY THE COURT.—CARDOZO, J.—I have been unable to find any evidence to justify the charge of the justice, that if the jury found that by the acts of the defendant he had recognized and ratified the sale of the goods to Bray & Dauchy, as his agents, the plaintiff would be entitled to recover. If I am correct in saying that there was no evidence from which the jury had a right to find any such recognition or ratification, then it follows that the judgment must be reversed, because it is impossible to say that the jury did not render their verdict upon this ground, especially when the justice being asked to charge “that there was no evidence of any consent to or ratification of the transaction in question by the defendant,” refused so to instruct the jury. The jury were, therefore, very plainly told, not only that ratification by the defendant would entitle the plaintiff to recover, which, as an abstract proposition, was undoubtedly true, but that there was evidence from which they might properly find such ratification.

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The grounds upon which the plaintiff claims that the jury might find a ratification are twofold: first, that this transaction was entered in the books kept by the defendant's agents, and that therefore he must be presumed to have had notice of the entry, and to have acquiesced in it by not disavowing it; and secondly, that he has adopted the act by accepting the proceeds.

As to the first ground:

If it be sustainable at all, it must be because the presumption of knowledge cannot be rebutted; for certainly, in this case, not only is the supposed legal presumption unsustained, as being true in fact, but it is fully denied and disproved by the evidence. Indeed, it was hardly pretended, on the argument, that the defendant had any express notice of the entry; but it was urged that notice to Bray & Dauchy was notice to the defendant, and *Allen v. Coit* (6 Hill, 318) was cited to sustain the proposition.

It is not necessary to dispute the authority of that case when the facts presented by it are carefully examined.

Notice to the agent, *when acting within the scope of his authority*, is undoubtedly notice to his principal, but the difficulty here is that it was a question of fact for the jury, upon conflicting evidence, whether the agents, in the transaction in question, had not exceeded their authority. If the jury found that they had, then notice to them in that behalf did not affect in any way the defendant in this case (see *Weiser v. Denison*, 10 N. Y. 68), and so the jury should have been instructed; and they should have been told that unless they found that Bray & Dauchy, in the transaction, had acted within the scope of their authority, their knowledge was not the knowledge of the defendant, and the notice which they had of their act was not notice to him.

It can only be contended that the entry of the transaction in the books kept by Bray & Dauchy was notice to the defendant (in the absence of proof that he examined the books) upon the theory that they were his agents, and that the books were kept in the business of the agency.

But if, and as far as, they exceeded their power, they were

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not his agents, and the entries which they made in the books as to such unauthorized transactions were not notice to the defendant.

In *Weiser v. Denison*, above cited, Judge Allen says (page 77): "The principle that notice to an agent is notice to the principal is quite familiar, but is only applicable to cases in which the agent is acting in the course of his employment. Were it otherwise, and did it extend to acts unauthorized and outside of the employment, whether trespasses or even felonies, the master might be made responsible for all acts, whether tortious or otherwise, done by the servant while in his employ or acting professedly in his behalf, if he did not act at once by disclaiming the authority. *The servant would necessarily have knowledge of his own wrongful act, and within the rule sought to be applied the knowledge of the servant would be that of the master; and if the latter, having knowledge, should not object, he might be deemed to acquiesce.* He would thus, by a legal fiction, be charged with the tortious, fraudulent, or even felonious, act of the servant. This is not the law."

Secondly. The other ground has no basis in fact. The proof fails to show that a single note given by Clark ever reached the possession of the defendant, and, on examination of the entries, put in evidence by the plaintiff, it is plain enough that no money has ever been realized upon them by any body.

I think it follows that there was no evidence upon which even a presumption arises which would justify the jury in finding that the defendant ratified the act of Bray & Dauchy, in case it was in excess of their power; and that the jury having been misdirected in this particular, the judgment should be reversed.

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WRIGHT POMEROY and another v. JAMES E. SHAW.

A person who accepts a delivery of goods manufactured for him on his order cannot resist an action by the manufacturer for the price, on the ground of a breach of warranty of *quality*, without showing that he returned, or offered to return, the goods as soon as he discovered the defect.

A mere objection to the quality of an article, by the defendant, not accompanied by an offer to return the same, is insufficient, and the objection is waived by the defendant's subsequently reducing the article to use.

An unconditional acceptance by a vendee of a delivery of goods on a day after the one agreed upon for the delivery, is a waiver of any claim for damages by reason of the delay.

On the trial of this action, the court (CARDOZO, J.) directed a verdict for the plaintiff, subject to the opinion of the general term.

It appeared in evidence that the plaintiffs agreed with the defendant to manufacture for, and sell and deliver to, him, a number of hair mattresses; a portion of them to be of the weight of thirty-six pounds each, and the remainder of twenty-eight pounds weight each. The mattresses were to be filled with pure horse hair, the materials to be of the best quality, and were to be made up in the best manner. The price to be paid by defendant, on delivery, was the sum of \$2,457.²²/₁₀₀. The mattresses were made, and were delivered. The defendant paid \$1,200 on account, and promised to pay the balance in a few days. This action was brought to recover this balance. The plaintiffs testified that the mattresses were made of the best quality of South American black horse hair, that the materials were of the best quality, and that they were made in the best manner. It also appeared that, after the delivery, the defendant made complaint about the quality of the hair, and about a deficiency of weight, but the defendant never offered to return the mattresses, although the plaintiffs themselves offered to take them back, and return the amount paid, which defendant refused.

The defendant offered to prove that he was not personally

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present at the delivery, and that his attention was not called to the defects complained of until after the delivery; that experts were called in, who found, on examination, that the hair was of an inferior quality, and not, in fact, all horse hair; that the ticks were of an inferior quality; that the mattresses were weighed, and were found to run short some ninety pounds; that plaintiffs were invited to be present at the examination and weighing; that the mattresses were to have been delivered at defendant's hotel, ready for use, on a day in September; that plaintiffs did not deliver them until the 2d day of October, and that defendant suffered loss by the delay in the delivery; that the mattresses, in the condition they were in when delivered, were not worth, by \$500, as much as they would have been if made according to contract; that, when the nonconformity to the contract was discovered, the articles were in actual use in rooms occupied by guests, and that it was out of defendant's power, under his arrangement with the tenants of the hotel, to return them without great loss and damage.

These offers of the defendant were objected to by plaintiffs' counsel, and the evidence excluded by the court, to which rulings the defendant's counsel excepted.

The court directed a verdict for the plaintiffs for the balance of the account, \$1,408 37, subject to the opinion of the court at general term, at which the exceptions should, in the first instance, be heard.

John G. Lamberson, for appellant.

D. T. Walden, for respondents.

BY THE COURT.—VAN VORST, J.—The contract in this case was executory. The plaintiffs agreed to make and deliver to defendant, at a price determined, a number of mattresses of the best quality, and of a given weight each. They were to be delivered by a certain time. The mattresses were manufactured and delivered to the defendant. Subsequent to their delivery, the defendant claims to have discovered that they were deficient in weight, and of an inferior quality to that contracted to be

delivered. On discovering the defects, he did not return or offer to return the articles, but, on the other hand, refused to do so, although the plaintiffs were willing and offered to take them back, and refund the money paid on account of them, if the defendant was not satisfied with the articles.

If an article agreed to be manufactured, sold and delivered, by one person to another, be found, on its delivery, to be different in quality from what it should have been by the terms of the contract, if the party means to insist that the contract has not been complied with, and that the article is not such as he was entitled to receive, he should at once return or offer to return the same. He cannot hold on to the article and convert it to his own use, and still insist on the defect. In this case, the deficiency complained of was in the *quality* of the article. It is true defendant complained that the weight was less than that agreed to be delivered. But it does not appear that the mattresses were purchased, or were to be paid for, by the pound. The whole number were to be paid for at the sum stated in the complaint. The character and quality of each mattress depended no less on its weight than the materials of which it was composed.

The case of an article ordered to be manufactured differs from that of the sale of a specific chattel *in esse*, accompanied by an express warranty. When one contracts to manufacture, sell, and deliver to another an article of a certain quality, or fit for a certain purpose, the purchaser may either refuse to receive or he may return the article *as soon* as he detects any deficiency, and may defeat an action for the price, provided he has done nothing more in the mean time than was necessary to give the article a fair trial (*Street v. Blay*, 2 Barn. & Ad. 456; *Mondel v. Steel*, 8 Mees. & W. 858). A mere objection to the quality of the article, unaccompanied by an offer to return, is not sufficient, and the force of the objection is lost where the vendee absolutely reduces the article to his use after the defect is discovered.

In *Grimaldi v. White* (4 Esp. 95), the action was brought by the plaintiff, a miniature painter, to recover the value of several pictures painted by him for the defendant. The pictures were

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sent home, and the defendant, at the time, objected to the execution of them as inferior to the specimen exhibited by plaintiff at the time he contracted to paint, and according to which they were to have been painted, yet the court would not allow the defendant, in an action against him for the price agreed to be paid, to introduce evidence tending to show that the pictures delivered were inferior to the specimens. The court, in that case, held that, if the defendant meant to avail himself of the objection that the pictures were inferior, he should have returned them—he should have rescinded the contract *in toto*.

In *Reed v. Randall* (29 N. Y. R. 358), it was held, that a vendee is not bound to receive and pay for a thing that he has not agreed to purchase; but if the article delivered is found, on examination, to be unsound, or not to answer the order given for it, he must immediately return it to the seller, or give him notice to take it back, or he will be presumed to have acquiesced in its quality (*Hargous v. Stone*, 5 N. Y. 73).

But in this case, with a knowledge of their defects, the defendant insists that he was not bound to return the mattresses, for the reason that they were in use, and for the very purpose for which they were designed in the hotel. The plaintiffs were willing to receive them back, and refund what was paid, but this proposal the defendant declined. Under the circumstances of this case, the plaintiffs were entitled to have the goods returned, or be paid the agreed price for them, if the defendant would hold on to them. In regard to the goods having been delivered after the day agreed on, the acceptance without objection, on that account, is a waiver of any claim of damages from that source.

Judgment below affirmed.

And judgment is directed to be entered on the verdict in favor of plaintiffs, with costs.

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ALONZO T. McMULLEN v. JESSE HOYT *and* ALFRED M. HOYT.

A licensed public carman, who carries on business on his own account, with his own capital, and his own wagons, horses, and servants, does not stand in the relation of servant to one who employs him to carry merchandise at an agreed price per package, so as to make the latter liable for the negligence of the servants of such carman.

APPEAL by the defendant from a judgment entered on the verdict of a jury at trial term.

This was an action for an injury sustained by the plaintiff, about nine o'clock in the evening of the 9th day of July, 1864, from being struck by a barrel of flour, which was being rolled from a truck in front of the defendants' store, No. 19 South street, over a skid extending from the truck to the store. When struck plaintiff was stepping over the skid.

The complaint substantially avers that the truck and skid belonged to the defendants, and that it was the defendants' servants who were unloading the truck, and who rolled the barrel in question over the skid, and that the injury was occasioned by the negligence of the defendants and their servants.

The defendants, by their answer, alleged that the truck and skid belonged to a licensed boss carman, who was employed by them to carry and deliver the flour into their store, for cartage to be paid therefor by the defendants; also that the truck and skid, at the time of the injury to the plaintiff, were in the possession and in the charge of the boss carman and his servants, by whom the flour was being unloaded from the truck, on the 9th.

On the trial it appeared that the plaintiff was struck by a barrel rolled over the skid by a man on the truck; that one end of the skid rested on the back part of the truck, and the other end was in the store. Before attempting to cross the skid, the plaintiff stopped on the stoop until a barrel passed over it, and then, in attempting to pass, he was struck by an-

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other barrel, which the truckman threw on the skid while the plaintiff was in the act of passing.

The plaintiff testified that he noticed on the truck "J. H. & Co." (being the initials of the defendants' firm), in red letters on a white ground. He also testified that, in an interview with the defendants, within a few days after the injury, in which their attention was called by him to the injury, and the circumstances under which it had happened, one of the defendants said: "I will go round and see my carman," and "I will be back in a few minutes;" and that, on coming back, he said: "I have seen my carman, but, as usual, nobody knows any thing about it."

Upon the plaintiff resting his case, the counsel for the defendants moved for a dismissal of the complaint, upon the ground that there was no evidence of facts sufficient to warrant the finding under the pleadings that the relation of master and servant existed between the defendants and carman, which motion was denied, and the defendants' counsel excepted.

The defendants' evidence showed that the truckman was a licensed boss carman; that he owned several trucks, and hired men to drive them, and paid his men by the week; that he was under no contract for his time with defendants, but worked for any person who might employ him; that he owned the truck in question, and that Henry Sarles, the driver, and person who unloaded it, and rolled the barrel in question, was in his employment for wages paid by him; that he was engaged by defendants to carry the flour in question with his own team and men, from one of the docks to their store, and that he was to be paid four cents a barrel for the carriage and delivery; that he was personally present at the time of the delivery of the flour at the store on the evening in question; that he had no special arrangement with defendants; if they gave him work, he did it, otherwise he had other places to work, and that he had put the letters "J. H. & Co." on the truck out of compliment to the defendants; that he had another truck with the name "of S. Smith" on it; that he kept his carts near the defendants' store; that the flour was received, on the occasion in question, at the store door, by two persons who stood near

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the store end of the skid, to catch the barrels, and roll them in the store; that defendants had no other relation to the truckman than such as any man has to a public drayman, or carman, whom he employs to do specific carting for him; and that he had done carting in that way for defendants for twenty years.

At the close of the evidence, the counsel for the defendants again moved for a dismissal of the complaint, on the ground originally urged, that there was no evidence to find that the relation of master and servant existed between the defendants and the carman; but that, on the other hand, it appeared that the barrel by which the injury was effected was rolled by a man on the truck, who was in the employment of Warren Cronk, a public licensed boss carman, who was the owner of the truck; and that it was done while Cronk was in the performance of a special contract made by him, with the defendants, to carry the flour from the dock, and to deliver it at defendants' store at an agreed price per barrel. The motion was denied, and the defendants' counsel excepted.

The judge charged the jury, among other things, that the question of fact for them to determine, so far as the evidence was in conflict, was whether the carman exercised a distinct or independent employment or business, and was employed by the defendants to carry the flour from the pier, and to deliver it at the store, at an agreed price, or an established rate, per barrel; or whether he stood to the defendants in the relation of servant, and was subject, as such, to the exercise of their control and supervision, in the performance of the service which he was employed to do. In the first case, the defendants would not be responsible for the negligent acts of the servants of the carman; but, in the other case, they would be liable. The judge then called the attention of the jury to certain "special circumstances" in the evidence, claimed by plaintiff to establish the relation of master and servant between defendants and Cronk; that Cronk had been employed by the defendants in a certain way, for a period of from ten to twenty years; that he was attached in such a sense to the house of defendants; that he kept his carts in the vicinity of their store; and that the initials of the firm were painted upon the truck.

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The judge further said: "If you arrive at the conclusion that there was that relation," of master and servant, "existing, to which I have adverted as necessary to make the defendants responsible for the acts of Mr. Cronk, or the persons in his employment, you will be justified in the conclusion, from the existence of such a relation, that the defendants are responsible."

The defendants' counsel excepted to the submission by the judge of the length of time that the defendants had employed the carman, and the other circumstances referred to by the judge, as insisted on, as taking the case out of the rule as applicable to an ordinary case of employment of a carman by a merchant.

The counsel for the defendant asked the judge to charge:

"That, as the case stood on the evidence, there was no sufficient evidence of facts to warrant the finding that the relation of master and servant existed between the defendants and the carman, or his driver on the truck."

The judge declined so to charge, and the defendants excepted.

The jury found for the plaintiff damages to the amount of \$750.

From the judgment entered on the verdict the defendants appealed.

Cornelius Van Santvoord, for appellants.

Thomas Nelson, for respondent.

BY THE COURT.—VAN VORST, J.—The just and proper disposition of this case depends upon the true relation which existed between the truckman and the defendants, at the time of the happening of the injury to the plaintiff.

If the truckman was then the servant of the defendants, they would be liable for the consequences of the act in question, if it was the result of negligence on the truckman's part.

The master has always been held answerable in damages for an injury resulting from the negligence or want of skill by a servant in the performance of the master's business.

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The relation of master and hired servant is a familiar one, and rests altogether on the agreement of the parties, and gives rise to various rights and liabilities other than those sought to be enforced in this action.

The master has a general authority and personal control over the one who stands to him in the relation of servant. In fact he has a property in the service of those whom he thus employs, acquired by the contract of hiring. The master may maintain an action against one who imprisons the person employed by him for the loss of service. (*Woodward v. Washburn*, 3 Denio, 369). Tested by these principles, it is manifest that the truckman was not the servant of the defendants in any sense to make them liable for his acts or omissions. They had no control over him, or of his time or services.

Had he failed to cart the flour from the dock to the store, defendants' remedy against him would have been an action for a breach of his contract to carry. If the flour had been lost or injured through any negligence on the part of the truckman in carting it to the store, the loss would have fallen on him, and he would have been liable thereupon to the defendants.

A person performing the work the truckman engaged to do for the defendants is not to be considered as their servant, but as one carrying on an independent business in the execution of which he employs others to aid and serve him.

When the injury occurred, the truckman himself was standing near. The negligent act was performed in his presence, and if any person is liable for the act of the man on the cart in rolling the barrel on the skid, it must be the truckman whose agent and servant he was.

By the strict application of the doctrine of *respondet superior*, there is but one person who can stand in the chief or principal relation. It would be illogical to suppose that the man on the cart was the servant of two several masters, or that two distinct persons could be severally liable for an act of negligence on his part. In the case of *Milligan v. Wedge* (12 Adol. & E. 737; 1 Q. B., 714), a butcher employed a licensed driver to drive a bullock from Smithfield to his slaughter house, and the driver himself employed a boy to perform the

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work. The boy performed his duty so carelessly, that the bullock, as he was passing the plaintiff's show-room, run into the shop and injured the plaintiff's premises and property. The injured party sued the owner of the bullock who was sought to be charged for the negligent act of the boy. But Williams, judge, on the trial, held that the boy was not the servant of the defendant, and the defendant had a verdict. The ruling of the judge in this case was unanimously affirmed by the court on an application to set aside the verdict.

A merchant who employs a licensed carman to do carting, at an agreed price per barrel or package, when the carman carries on his business on his own account, as a separate employment distinct from that of the merchant, with his own means and his own hired men, does not stand to the carman or his employees in the relation of master to servant, and is not responsible to third persons for injuries resulting from the negligence or misconduct of the carman or his employees in the performance of his undertaking with the merchant. (*Martin v. Temperly*, 4 Q. B., 298; *Deforest v. Wright*, 2 Mich. 368; *Overton v. Freeman*, 8 Eng. Law & Eq. 479; 11 C. B. 867; *Butler v. Hunter*, 7 Hurlst. & Nor. 826, 832; *Laugher v. Pointer*, 5 Barn. & C. 547; *Story on Agency*, §§ 453 a., 453 b., 454.)

When the plaintiff rested his case, the defendants moved for a nonsuit or dismissal of the case, on the ground that the relation of master and servant between the defendants and the truckman had not been established. The motion was denied.

This disposition made by the learned judge at that time was correct. For when the motion was made, the true relations of the parties to each other did not clearly appear.

There was some evidence on the subject, slight indeed, but it tended somewhat to show that the truckman was servant to the defendants.

It appeared that the initials of the defendants' name were on the cart; it was unloaded before the defendants' store, and the barrels were rolled over the skid to the store, and were then received by defendants' clerks, and one of the defendants had used the expression "my carman" to the plaintiff when addressed on the subject of the injury. This was some evidence

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for the consideration of the jury on the subject as to whether the defendants were not liable for the injury, and where there is any evidence the judge is not warranted in nonsuiting (*Labar v. Koplín*, 4 N. Y. 547).

But the testimony subsequently offered by the defendants established the true relations which existed between the defendants and the truckman. By this evidence it appeared that the truckman was employed to do this specific work for a compensation; he was to receive a certain sum per barrel; that defendants had no control over him or of the manner in which he performed the work. He used his own truck and men to perform the service.

It was proved beyond controversy that as well the truck and horses as the skid were the property of the truckman; the fact of the initials of the defendants' name being on the cart was satisfactorily explained.

The initials of the defendants' name being on the cart could not tend to make them liable for the injury, nor would the fact indeed that they were the *owners* of the vehicle render them liable, unless it was driven and controlled on the occasion in question by some person in their service, and drawn by their horses; neither of which circumstances existed (*Quarman v. Burnett*, 6 Mees. & W. 499). In *Weyant v. The New York & Harlem Railroad Company* (3 Duer, 360,) the plaintiff was thrown out of his wagon and injured in Canal street by a car belonging to the New Haven Railroad Co., and which was at the time passing on a track used by it; the horses which drew the car belonged to the Harlem Railroad Company, and the driver was in their employment. It was held in that case that the Harlem Railroad Company and not the New Haven were liable for the injury.

The circumstance that the truckman had done carting for twenty years for the defendants in any way could not give character to this particular work, for the performance of which he was specially engaged. If he had done carting in this way for the defendants for any length of time, it could not create the relation of master and servant between the truckman and defendants in this transaction.

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There was nothing, it appears to me, for the consideration of the jury after the evidence was closed. And the defendants' motion for a dismissal of the complaint which was then renewed should have been granted. Whenever a verdict would be against the clear right of evidence, a nonsuit should be ordered at the trial (*Rudd v. Davis*, 7 Hill, 529; *Lomer v. Meeker* 25 N. Y. 361).

The evidence will not sustain this verdict. It should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

GEORGE J. TURNER v. JAMES B. TAYLOR, CHARLES W. BAKER,
and BENJAMIN F. MUDGETT.

Where an action involves the examination of an account between the parties, it is, in its nature, referable, depending upon the fact whether it is, or is not, a long one; and with the conclusion of the judge granting the order, upon such a point, an appellate tribunal will not interfere, unless the judge certifies that the point is one of sufficient importance, or doubt, to warrant a review.

An order granting a reference in a case where it is doubtful whether the examination of an account was at all so directly involved as to make a reference compulsory, may be reviewed on appeal.

To render a reference compulsory, an account must be directly in issue, or there must be no question remaining to be determined, except the adjustment of the items constituting the account; and it is not sufficient that one may have to be examined collaterally for the purpose of establishing some one of the issues in the action.

Where in an action on contract, to recover the price of certain lands sold by the plaintiff to the defendants, and by them sold to a company, of which the plaintiff was made superintendent, and the defense to such action was fraud in the inception of the contract, and the failure of the plaintiff to disburse the moneys of said company properly, thus causing the failure of the enterprise; and the defendants applied for a reference, on the ground that it would be necessary to examine the accounts of the plaintiff as such superintendent: *held*, that such examination was not directly involved in the issue, and was at most one arising collaterally, and that a reference should not be granted.

(CARDOZO, J., dissenting.)

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THIS is an appeal, by the plaintiff, from an order made at special term, appointing a referee to hear and determine the issues in this action.

The action was brought on a written contract made by and between the plaintiff and the defendants, on the 6th day of July, 1864. The contract recited that the plaintiff had conveyed to the defendants a certain mining claim and water-power, near Austin, Lander county, Territory of Nevada, being two ledges of silver ore, called Romulus and Remus; and that the defendants proposed to form a corporation, under the laws of the State of New York, and make the stock of the said company 800,000 shares, divided into shares of \$100 each, for the purpose of working said mines, and place the same in operation forthwith, or as soon as the same could be reasonably done. By the contract the defendants agreed to pay the plaintiff \$18,750 on or before September 15, 1864, and deliver to him one-fifth of the capital stock of the proposed corporation: "it being understood that said parties of the first part" (the defendants) "intend to carry out the aforesaid purposes, and in case of failure on their part to succeed in said project, then they are to cancel said deed; and the party of the second part" (the plaintiff) "thereupon agrees to cancel this agreement; said deed to remain, until the consummation of the above agreement, in the hands of Charles W. Baker, as an escrow." The complaint states that the defendants organized a company in pursuance of the said contract, and issued shares as therein proposed, and received and accepted plaintiff's deed, and immediately conveyed the property to the Roman Brothers Silver Mining Company, and delivered to the plaintiff one-fifth of the stock of said company; and that the plaintiff demanded of the defendants \$18,750, but the same had not been paid, &c. The defendants, in their answer, admit the contract, the organization of the company, the delivery and acceptance of the deed, the conveyance to the company, the delivery of the one-fifth of the stock to the plaintiff, and his demand for \$18,750, and set up two defenses: First, "that they were induced to enter into the said contract by certain fraudulent misrepresentations

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on the part of the plaintiff." Second, "that by the terms of the said agreement, the same was to be canceled and given up if the defendants should not succeed in carrying out the project in said agreement contemplated and mentioned;" and the defendants claim that they failed to succeed, and without any fault on their part, but on account of the fault of the plaintiff. It appeared from the affidavit used by the defendants on their motion for a reference below, that the plaintiff had been made superintendent of the company, and, as such, had received \$14,250, in different payments, to be used in the development of the mines; that it had not been used for that purpose; and that plaintiff had rendered an account of said funds, consisting of seventy-six different items, most of which were disputed, and all of which would have to be examined, and proof taken of them, on the trial of this action, and that the trial would involve the examination of a long account. An affidavit of the plaintiff was read on the motion denying the charge of misrepresentation, or fault, on his part, and that there were any items of account involved in this action; and alleging that the said sum of \$14,250, received and expended by him in his official capacity as superintendent of said company, had nothing to do with the issues in this action, and that his accounts have long since been settled with the company.

Motion for reference granted.

From the order entered the plaintiff appealed to the general term.

Fullerton, Knox & Rudd, for appellant.

I. The principal issue involved in this action is one of fraud; such an issue is not referable, and must be tried by jury (Constitution of the State of New York, Art. 1, sec. 2; *Levy v. The Brooklyn Fire Ins. Co.*, 25 Wend. 687; 10 How. Pr. 11; 18 How. Pr. 213; 18 How. Pr. 310). The foundation of this action is not an account; the pretended account urged by the defendants as the foundation of a claim for a reference is not in the action at all: (1.) It is not between the parties to the action (*Van*

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Rensselaer v. Jewett, 6 Hill, 373). (2.) If the pretended account is sought to be introduced, to show a reason for the defendants' want of success, it should not be admitted, because the defendants succeeded within the meaning of the contract, as they had organized the company, and accepted the deed, which was to remain in escrow until the consummation of the contract; and having conveyed the property to the company, they were unable to cancel the deed and rescind the contract, and are, at all events, estopped from denying their success. (3.) If the proposed account is in the action at all, it is only collaterally so, and is not the foundation of an action, and is no ground for a reference (*Freeman v. Atlantic Mutual Ins. Co.*, 13 Abb. Pr. 125; *Cameron v. Freeman*, 18 How. Pr. 310).

II. A collateral issue may be referred without referring all the issues which should not be referred (*Graham v. Golding et al.*, 7 How. Pr. 260).

Marsh, Coe & Wallis, for respondents.

I. The order appealed from is not appealable. This has been distinctly held in this court, in *Ubsdell v. Root* (1 Hilton, 173); the court citing and approving *Gray v. Fox* (1 Code R. N. S. 334); *Bryan v. Brennon* (7 How. Pr. 359); *Dean v. Empire State Mutual Ins. Co.* (9 How. Pr. 69); *Tallman v. Hinman* (10 How. Pr. 89); such an order does not involve the merits of the action (*Baker v. Nussbaum*, 1 Hilton, 549; *Conlan v. Latting*, 3 E. D. Smith, 353). The certificate required by a rule of this court (Code, p. 921) has not been procured in this case.

Under the Code, the authority to refer is much broader than before, for the Revised Statutes restricted a reference to actions founded on contracts (2 R. S., p. 384); but by the Code (sec. 271), there is no such restriction, and an action founded on fraud is referable (*Sheldon v. Wood*, 3 Sand. 739), also the issues on a motion for a provisional remedy (*Jackson v. De Forest*, 14 How. Pr. 81).

DALY, F. J.—Where the action is one involving the exam-

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ination of an account between the parties, in the ordinary acceptance of that term (*Van Rensselaer v. Jewett*, 6 Hill, 374; *Thomas v. Reab*, 6 Wend. 504), it is, in its nature, referable, depending upon the fact whether it is or is not a long one, which is to be ascertained by the judge to whom the application for the reference is made, and, with his finding or conclusion upon such a point, an appellate tribunal will not interfere, unless a certificate is obtained from the judge that the point is one of sufficient importance or doubt to warrant a review (*Ubedell v. Root*, 1 Hill, 174; *Kinney v. Showdy*, Id. 544; *Gray v. Fox*, 1 Code R. N. S. 334; *Dean v. The Empire State Mutual Ins. Co.* 9 How. Pr. 69; *Parker v. Snell*, 10 Wend. 577). But this was not such a case, for the question here was not whether the account was a long one, but whether the examination of an account was at all so directly involved as to make a reference compulsory. The order was therefore appealable (*Freeman v. The Atlantic Mutual Ins. Co.* 13 Abb. Pr. 125, and cases above cited).

An account is not involved, so as to make a reference compulsory, because one may have to be examined collaterally for the purpose of establishing some one of the issues in the action (*Cameron v. Freeman*, 18 How. Pr. 310). It must be directly in issue, or there must be no question remaining to be determined, except the adjustment of the items constituting the account (*Keeler v. The Poughkeepsie & Salt Pond Plank Road Co.* 10 How. Pr. 11). It was not the intention, said Bronson, J., in *Dederick's Adm'r's v. Richley* (19 Wend. 108), to take away the right of trial by jury merely on ground that the accounts and dealings of the parties might *incidentally* come in question, but to provide for those cases only where an account was *directly* involved in the issue, and where little was to be done beyond a proper adjustment of the dealings of the parties. Nor is it involved because a number of separate and distinct facts or items will have to be proved by a large number of witnesses (*Sharp v. The Mayor &c. of New York*, 18 How. Pr. 213). An account, said the court, in *Freeman v. The Atlantic Mutual Ins. Co.* (13 Abb. Pr. 125), is a series of charges for goods sold, &c., &c., and not one introduced in evidence for the

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purpose of estimating damages. It is the foundation of the action; and it was held in this case, that, although the quantity and value of the goods alleged to have been lost were necessarily involved, yet as both issues involved a charge of fraud, the cause could not be referred, as such questions are properly to be tried by a jury. In *Thomas v. Reab* (6 Wend. 503), an order of reference was vacated as unauthorized in an action for the breach of the covenants of a lease, although the whole time occupied at the trial—ten hours—had been spent by the plaintiff in examining witnesses as to the items of his damage; his claim embracing a great number of items, and although the judge at the trial, upon his own motion, had ordered the reference. In an insurance case, where every thing was admitted but the amount of the plaintiff's loss, a reference was ordered, as the plaintiff's claim embraced a great variety of items (*Samble v. The Mechanics' Fire Insurance Co.* 1 Hall, 560). It may be doubted whether this was in strictness an account (*McCullough v. Brodie*, 13 How. Pr. 346), or any thing more than the ordinary proof of the items of damage in an action, and, if the case is maintainable, it is solely upon the ground that nothing else remained to be ascertained in the action. In an insurance case, although the property destroyed consisted of a variety of articles, differing in quantity and value, an order of reference, made by the circuit judge, was vacated, because there was also involved questions of fraud, which, the court held, the plaintiff was entitled to have tried by a jury (*Levy v. The Brooklyn Fire Ins. Co.* 25 Wend. 687). In *Sheldon v. Wood* (3 Sandf. 739), a reference was ordered in an action brought to recover back money alleged to have been fraudulently charged in an account between the parties, but here the question directly involved was the correctness of the account, which brought the case within the provisions of the statute authorizing a reference, although there was a question of fraud.

In the present case, the action was brought upon a written contract, by which the defendants acknowledged that the plaintiff had conveyed to them a mining claim in Nevada Territory, for which they engaged to pay him by a certain date \$18,750, for the recovery of which the action is brought. The agree

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ment set forth that the defendants propose to form a corporation for the purpose of working the mine as soon as it can be reasonably done; that the plaintiff, in addition to the payment of the sum above mentioned, is to have one-fifth of the capital stock of the corporation; that in the event of the failure on the part of the defendants to succeed in said project, they are to cancel the deed of the plaintiff, and the plaintiff is to cancel the agreement, and that the deed is to remain in the hands of Baker, one of the defendants, until the consummation of the agreement.

The complaint set forth that the company was organized; that the deed was delivered by Baker to the defendants; that they immediately conveyed the property to the Roman Brothers Silver Mining Company; that they delivered to the plaintiff one-fifth of the stock of that company, and that he has demanded of the defendants the \$18,750 due by the terms of the contract.

The defence of the defendants is, *first*, fraud in the inception of the contract; *second*, that they failed to succeed without any fault on their part, but on account of the fault of the plaintiff, and that they are entitled to have the agreement canceled.

The grounds upon which the defendants obtained the order of reference were these: That the company organized by them, and of which they are the chief members, paid to the plaintiff the sum of \$14,250, which was entrusted to him as the general superintendent of the company, for the purpose of carrying out the project and putting the mine in operation. That the plaintiff instead of devoting the money he had received to the purpose for which it was paid, appropriated a large amount of it to his own use. That they failed to succeed in the project, and that their failure was caused by the neglect of the plaintiff himself and, *among other things*, by his appropriation to his own use of a large amount of the money entrusted to him. That he rendered an account for the purpose of showing that the money received by him was expended in the business of the company, and that the failure of the project did not arise from his fault or neglect; that the account consists of seventy-six items, most of which are disputed, and all of which will have to be examined and proof taken respecting them.

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In answer to the motion, the plaintiff testified that he received the \$14,250 as the general superintendent of the company, to be disbursed for them in his official capacity, at their mines at Nevada; that his disbursement and accounts have been settled long since, and that all differences of every kind that ever did exist between himself and the company have long since been settled, and general releases passed between him and them.

It is apparent upon the defendants' own showing that this \$14,250, or the use made of it, is not directly involved in this action. The defendants do not seek, and if they did could not recover, in this action, any part of it, for the plaintiff received it from the company, and for the use which he made of it he is accountable only to them. There is to be no adjustment and settlement of it in this suit, and indeed I doubt whether the defendants can go into it at all, as they are no longer in a position as individuals to cancel the plaintiff's deed, having conveyed the property to the company; but even if they should have the right to inquire into the disposition which the plaintiff made of it, and to dispute the items in the account which he gave to the company of the disbursement of it, it would not be a matter directly involved in the issue, but one arising collaterally as evidence tending to establish their defence that the project failed without any fault on their part, and that they were entitled to be released from the agreement. The items of loss and injury, in an ordinary action for damages, are much more directly involved, as they constitute a part of the recovery, and yet such actions are not referable, however numerous or varied the items of damage may be.

In *McCullough v. Brodie* (13 How. Pr. 346), the plaintiff sued the defendant for falsely representing that he had the secret of and the exclusive right to manufacture a certain kind of soap, upon which representation and the defendant's promise to instruct him how to make the soap, the plaintiff bought the secret for a valuable consideration, and incurred great expenses in establishing a factory and in purchasing materials, whereby he incurred loss. He moved for a reference, alleging that the items of damage resulting from the establishing of the factory

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and the purchasing of materials would involve the examination of a long account, but his application was denied upon the ground that this was not an account in the ordinary acceptance of the term, as the trial would not involve an enquiry in relation to payments made by either to, or property received by either from, the other. This was the court's view of the species of account for which a reference would be ordered, and it applies to the present case. No such account exists here. The questions involved are fraud in the inception of the contract, and bad faith on the part of the plaintiff in the embezzlement of the money entrusted to him by the company for the working of their mine, and it is the plaintiff's right to have these questions tried by a jury. The order directing the reference should therefore be reversed.

BRADY, J.—The defense in this case rests upon charges of fraud against the plaintiff, the proof of which partially consists in showing that the plaintiff misappropriated a sum of money given to him for a purpose specifically connected with the subject-matter of his claim. The plaintiff denies the charge, and gives in detail the items of expenditure, making up the total of the sum received by him. That the trial may be characterized by incidents which will warrant or require the examination of such items may be conceded; and yet the case is not necessarily one in which a reference should be ordered. The action is one on contract. In such actions, a reference may be ordered, but only where the gravamen of the complaint involves an account of which a judgment is to be predicated. The condition or accuracy of the account, in other words, being the issue upon which the judgment depends, and upon the finding as to which the court should base its action in reference to the demand made. In this case, the accounting or examination of a long account is incidental or collateral, and not affirmative. It relates to a defense which it may prove or disprove, but of which, as an account, no judgment can be predicated. If the defendants sustain by it the allegation that the plaintiff failed to perform his part of the contract made between the parties, they may be entitled to judgment in their favor, and nothing

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more. It is no part of the plaintiff's case; on the contrary, it may, or may not, be necessary to examine it in rebuttal of the defendants' charge, the whole subject depending upon the defendants giving such proof as calls for the evidence of a proper appropriation of the fund to which it refers by the plaintiff. In the case of *Hatch v. Wolfe*, to which Judge Cardozo refers, the account *related expressly to the demand of the plaintiff*, and the action was one of covenant. I dissented from the judgment of my brethren in that case, but I submit to its authority. I think it is not in conflict with the conclusion of Judge Daly on this appeal, for the reason that the items to be examined were the sums claimed as damages for a violation of the covenant to keep the plaintiff's premises in repair, and were to be regarded as money paid, or to be paid, on behalf of the defendant in that action. In *Devlin v. The Mayor*, the action was also on contract, and in part rested upon a balance claimed, to ascertain the accuracy of which the examination of an account became necessary, in the opinion of the judge at special term. The account was, therefore, the gist of a branch of the plaintiff's action, and upon which that part was based. It was affirmative, therefore, and not collateral. I think the conclusions of Judge Daly are sustained by authority. I concur with him. The order at special term should be reversed.

CARDOZO, J.—This action is on contract. It is therefore referable in its nature; and, unless we mean to overrule a great number of authorities, including several very recent ones in this court in which the opinions were written by Judge Daly, and as to the accuracy of which I have not the slightest doubt, and which, at all events, it is better to adhere to, so that the practice may be settled instead of being considered vacillating and changeable, this appeal should be dismissed (*Hatch v. Wolfe*, Nov. Genl. T., 1865; *Devlin v. The Mayor*, July Genl. T., 1866). In the latter case, Daly, First Judge, said: "If an action is not in its nature referable, as in actions for defamation or in assault and battery, an appeal will lie from an order of reference, but if the action *is of the class* in which references are allowable, and there was any evidence be-

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fore the judge that it would require the examination of a long account, an appellate court will not review his determination upon that point, but will regard it as conclusive and final." Again, in *Hatch v. Wolfe*, Daly, First Judge, said: "This is not an action for a tort, but for a breach of a covenant to keep premises which had been demised to the defendant in good and tenantable repair, and the order directing a reference upon the ground that it would require the examination of a long account is not an order affecting the merits, or which involves a substantial right, and is not appealable."

If those cases were correctly decided, they are decisive of the present appeal. I do not know of any reason why we should make a new or different rule for this case. I need only add that in my judgment this case presents an account, *and a very long one*, which must be examined, and that the Code, which is broader than the Revised Statutes upon the subject of references, authorizes a reference where the trial will require the examination of a long account on "*either side*" (§ 271).

I do not think it worth while to review the cases cited by Judge Daly, or to cite others decided since the Code in which references were ordered where the account only incidentally came into question, because I consider it enough to say, borrowing Judge Daly's own views in the cases I have cited, that this being an action on contract and referable in its nature—belonging to the class of actions that may be referred—and there being evidence of an account before the judge at special term, the order made below neither affects the "merits," nor involves a "substantial right," and it is therefore plain that the appeal should be dismissed.

Even if the decisions made by Judge Daly, and in which no account existed in any sense different from the one in the present case, were erroneous, I think it would still be better to adhere to them, because it is not of much importance how the practice is settled, but it is of the greatest importance that when once declared it should be adhered to.

I think the appeal should be dismissed with costs.
Order reversed.

The National Bank of the Commonwealth v. The Grocers' National Bank.

THE NATIONAL BANK OF THE COMMONWEALTH v. THE GROCERS'
NATIONAL BANK.

The drawee of a check is presumed to know the handwriting of the drawer, and the genuineness of the signature to the paper, and, having paid the same, cannot recover back the money from the payee, although it afterward appears that the name of the drawer was forged.

The plaintiff's bank, in the regular course of its business, received from one of its depositors a check drawn upon the defendant's bank, and passed the same through the bank clearing-house, where it was debited to the defendant, and credited to the plaintiff. The defendant afterward finding that the drawer's signature was a forgery, returned the check to the clearing-house, contrary to its rules, where it was credited to the defendant and debited to the plaintiff, who paid it. *Held*, That the payment of the check by the plaintiff was not voluntary, and did not prevent a recovery of the amount from the defendant.

APPEAL by the defendant from a judgment of the First District Court. The action was commenced before the justice by summons, with a complaint annexed. On the return day the parties appeared before the justice, and the defendant interposed no answer to the complaint, but admitted the facts therein stated to be true. The complaint averred that in December last, the plaintiff received on deposit from one of *its dealers* a bank check drawn upon the defendant; that the check was passed by the plaintiff to the credit of its dealer; that the plaintiff and defendant were both members of the New York Clearing-House Association, which was formed for the purpose of adjusting the balances of accounts, and settling the dealings of and between the several banks in the city of New York; that by the constitution and rules of the Clearing-House Association, the checks on other banks, received by banks belonging to the association from any of its dealers, are, on the morning of the day next after their receipt, presented at the clearing-house, and there all the checks so received by said banks respectively are assorted for exchange between said banks, and the amount of every check then appearing to be drawn against

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any bank is credited in account to the bank to which it is presented, and is charged and debited in account against the bank on which it appears to have been drawn, in the accounts of said clearing-house, whether the same be or be not good or valid.

In accordance with the above-mentioned custom, the plaintiff, on or about the 18th day of December, 1866, sent the check to the clearing-house, and the plaintiff was then and there credited, and the defendant debited, with the same. The defendant, on the 6th of March, 1867, returned the check through the clearing-house to the plaintiff, on the ground that the same *was a forgery*, in violation of the rules prescribed by the association, and of the rights of the plaintiff, and thereupon the defendant was credited, and the plaintiff debited, with the amount of the check on the books of the Clearing-House Association; whereupon plaintiff immediately brought this suit to recover the amount from the defendant. The case was submitted to the justice on the complaint, whereupon the justice rendered judgment in favor of the plaintiff for the amount for which the check purported to be drawn, from which judgment the defendant appealed to the general term of this court.

Raymond & Coursen, for appellant.

Convers & Lyman, for respondent.

BY THE COURT.—VAN VORST, J.—The drawee of a check or bill of exchange is presumed to know the handwriting of the drawer, and the genuineness of the signatures to the paper, and having paid the same, although it should afterward be discovered that the name of the drawer was forged, he cannot recover back the money from the party to whom it was paid.

This was determined quite early, in *Price v. Neal* (3 Burr. 1354). In that case, two forged bills were drawn upon the plaintiff. Notice of the first bill was left at the plaintiff's house on the day it became due; plaintiff sent his servant to call on the defendant to pay it, which was done. The other bill the plaintiff accepted and paid at maturity. On discover-

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ing the forgery, plaintiff brought an action for money had and received, to recover back the amount paid. The court held that the action would not lie. Lord Mansfield said it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was in the drawer's hand before he accepted or paid it, but that it was not incumbent on the defendant to inquire into it.

If the holder was at all implicated in the forgery, the action would lie against him (*Bank of Commerce v. Union Bank*, 3 N. Y. 230).

In this last case, the Bank of Commerce was allowed to recover back the amount of a forged bill which it had paid to the Union Bank, but the recovery was justified on the ground that the forgery was not in counterfeiting the NAME of the drawer, "but in altering the body of the bill," there being no presumption that the body of the bill is in the handwriting of the drawer, or in any handwriting known to the drawee; and it is unreasonable to require of him knowledge of the handwriting of any part of the bill except the signature of the drawer.

The case first above cited charges the loss of the drawee to his own negligence, in accepting or paying a bill which he should have known to have been a forgery. The last case does not question, but in terms affirms, the principle announced in *Price v. Neale*.

The check in this case appears to have come regularly to the plaintiff in the course of business from its dealers, and under no circumstances to excite suspicion, or make inquiries necessary. The check went to the clearing-house, and was then, in an adjustment of the checks and accounts between plaintiff and defendant, in pursuance of the rules of this body, credited to plaintiff and charged to defendant. As the usage of the clearing-house is not to pass upon the genuineness of the paper which passes through it, the act of debiting the defendant with the amount of the check should not charge the defendant with having adopted or accepted the check. But the check went from the clearing-house to the defendant's bank, and was there received, and its being charged to it at the clear-

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ing-house was acquiesced in by the defendant. It does not appear how soon the defendant ascertained the forgery, but it appears that it held on to the check for several months, and then, "in violation of the rules prescribed by the association, and of the rights of the plaintiff," returned same to the clearing-house, and caused it there to be debited to the plaintiff and credited to itself.

The plaintiff at once repudiated this debiting of the check to its account, and of the return of the check, by bringing this action. If the defendant can in this way, and by the instrumentality of the clearing-house, and against its rules, succeed in getting back money which it had previously paid on a forged check, it may do indirectly what it cannot do directly. It is quite clear that if the defendant had sued the plaintiff for the money as soon as the forgery was discovered, it would have failed in the action. The fact that the Bank of the Commonwealth is plaintiff rather than defendant cannot change the absolute rights of the parties.

The payment by the plaintiff, on the return of the check to it, was not voluntary. It was forced by the action of the clearing-house.

This action is equitable in its nature. The question really is upon whom the loss should fall. Under the circumstances of this case, I think the defendant should bear the loss.

Judgment affirmed.

SAMUEL PHILIPS v. DARIUS W. SMITH *and* ISAAC H. DAHLMAN.

A bond, given by the vendors of certain property, conditioned that if the premises should be released from the lien of a certain judgment on or before a certain day, the bond should be void, &c., is not an absolute promise on the part of the obligors to pay and discharge the judgment. It is merely an undertaking to indemnify against damage which the grantee of the premises might sustain by force of "the lien" of the judgment.

In an action upon such a bond by the purchaser, for condition broken, it must

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appear affirmatively that the judgment was a lien on the property at the time of the conveyance.

APPEAL by the plaintiff from a judgment of the general term of the Marine Court, affirming a judgment of dismissal.

The action was brought on a bond given by the defendants. The complaint alleges that Lydia C. Smith and Darius W. Smith, her husband, on the 25th February, 1865, by warranty deed, with full covenants, conveyed certain premises in the city of New York to the plaintiff. That at that time there remained unsatisfied, of record in the office of the clerk of the city and county of New York, a certain judgment docketed against one William H. Sparks, in favor of William P. Hyett, for the sum of \$250.97; that the judgment was a lien on the premises, the same having been owned by Sparks, and conveyed by him after the docketing of the judgment; that, in view of the judgment, the plaintiff declined to take the title, unless the judgment was paid. That thereupon, and in order to induce the plaintiff to take the title, the defendants, on the 17th day of March, 1865, executed and delivered to the plaintiff a bond, under their hands and seals, in the penal sum of \$500, said bond being conditioned, that if the property should be released from the lien of the judgment on or before the 15th June, 1865, the same to be void, &c.; that the property was not released from the judgment at any time before, nor on the day specified, whereby the plaintiff claimed damages to the amount of the judgment.

The defendants, in their answer, admitted the recovery of the judgment, and that it was unpaid, but denied that it was, or ever had been, a lien or incumbrance on the premises; and averred that Sparks had no interest in the premises when the judgment was recovered or docketed, nor subsequent thereto. On the trial, the plaintiff offered the bond in evidence, and rested; whereupon the defendants moved the dismissal of the complaint, which was granted; and from the judgment of the general term, affirming this judgment of dismissal, the plaintiff appealed to this court.

Livingston K. Miller, for appellant, cited *Juliand v. Bur-*

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gott (11 John. 477); *Port v. Jackson* (17 John. 239, 479); *Thomas v. Allen* (1 Hill, 145); *Gilbert v. Wiman* (1 N. Y. 550); Washburn on Real Prop. (vol. 2, § 5, p. 697).

William Ware Peck, for respondents, cited *Ells v. Tousley* (1 Paige, 280); *Keirsted v. Avery* (4 Paige, 9); Code, § 280; *Delevigne v. Norris* (7 John. 358).

BY THE COURT.—VAN VORST, J.—The obligation relied on by the plaintiff, as the foundation for a recovery, is not an absolute promise on the part of the obligors to pay and discharge the judgment in question. There is no absolute promise, even for its removal from the record.

If such had been the character of the undertaking, the defendants might well have been held liable in an action for the amount of the judgment, if the same had not been paid, discharged, or removed by the day named.

But the undertaking in question is of the nature of an obligation to indemnify against damage which the grantee of the premises might sustain, by force of "the lien" of the judgment. If there was no lien, there could be no damage.

The obligation assumed by the signors of this instrument is truly conditioned only.

They undertake that the property shall be released from "the lien of the judgment" on or before the 15th day of August, 1863.

It is quite clear that, if the judgment was not a lien on the property at the time of the conveyance to the plaintiff, then there was no incumbrance to be removed, and no damage could have occurred, or can happen, to the grantee of the premises by reason of the judgment, and no liability could arise under the bond.

The bond in question, by its terms, is no broader than the covenants of warranty in the deed.

No recovery could be had against the covenanters in the deed, unless the judgment was proved to be a lien on the premises, in which event damage would be presumed to follow.

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The bond in question was, doubtless, exacted by the grantee as further security for the performance of the covenants in the deed, one of the grantors being a married woman.

In order to have entitled the plaintiff to recover in this action, he should have established, by affirmative proof, that Sparks, the judgment debtor, was seized of the premises, or of some part thereof, at the time of the docketing of the judgment, or subsequent thereto; or, in other words, that the judgment was a lien on the property at the time of the conveyance thereof to the plaintiff.

This he failed to do, and the complaint was properly dismissed.

Judgment affirmed.

CHARLES KONEY v. WARREN WARD.

The owner of a domestic animal, who knows its vicious propensity, is liable in damages for injuries committed by it in the indulgence of its evil disposition.

The defendant's horse was standing upon the sidewalk, hitched to a wagon, and the plaintiff, who was passing, although aware of the vicious propensity of the defendant's horse, yet knowing he was usually muzzled, stepped from the sidewalk into the street, and endeavored to pass in front of the animal, without observing that he was not then muzzled, and was bitten by him: *Held*, that it was not such contributory negligence as would prevent a recovery for the injuries received.

APPEAL by the defendant from a judgment of the Third District Court.

The action was brought to recover damages sustained by the plaintiff under the following circumstances: The defendant owned a horse which was accustomed to bite; he knew of the vicious propensity of the animal, and, to guard against it, usually kept him muzzled. On a day in October, 1866, the horse was standing on the sidewalk in Twelfth street, before defendant's wagon, which was backed up to defendant's lumber yard. The horse was not muzzled at the time; he had been fed a short time before, and the muzzle had been removed to feed

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and water him ; after which the horse was led, by the person who had him in charge, to the wagon, and hitched to it. The defendant's servant was then about to go to the stable for the muzzle to put on the horse. At this time, the plaintiff, returning from his dinner, came along the sidewalk, and stepped from the walk into the street to pass the horse's head ; but as he was in the act of stepping back near the horse's head, he was caught and bitten in the shoulder by the animal. The plaintiff had known the horse for two or three years, and knew that it was accustomed to bite. The defendant's servant saw plaintiff approaching, and called out to him by way of warning. Plaintiff did not hear the call until he was at the horse's head, and, as he turned toward the person calling, he was bitten. Plaintiff knew that the defendant kept his horse muzzled, but did not notice that the muzzle was off until he was seized and bitten. The plaintiff says, when he was bitten, the defendant was engaged in loading the wagon. The plaintiff was laid up, and prevented from working, for two weeks, from this injury, and incurred medical expenses incident to his cure. The justice rendered a judgment in favor of the plaintiff for \$50 damages, from which judgment the defendant appealed to the general term of this court.

John E. Parsons, for appellant.

W. C. Carpenter, for respondent.

BY THE COURT.—VAN VORST, J.—A person who keeps a domestic animal which has, to his knowledge, a vicious propensity, is liable in damages for the injuries committed by it in the indulgence of its evil disposition. The action rests upon the negligence of the owner in keeping an animal which is so likely to prove injurious and hurtful. The *scienter* is the gist of the action. In *Coggswell v. Baldwin* (15 Vermont R. 404), it was decided that the owner of a "cow accustomed to hook—the vicious propensity being known to the owner—is liable for damages done by her, although it be done in the highway, against the land of the owner, and while going to her usual

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watering place." In that case, the owner of the cow, knowing her propensities, had caused buttons to be put on her horns as a preventive. But the cow hooked the plaintiff's horse, in the road, so that of the wound made he died, and the plaintiff had a verdict. In the case before this court, it appears that the defendant knew that his horse had the habit of biting, and to guard against it he kept him muzzled. At the time the injury was sustained by the plaintiff, the horse was standing on the sidewalk unmuzzled.

This was negligence. The horse should not have been allowed to stand in that condition in the public street any length of time. He should have been immediately muzzled after being fed and watered, and before he was hitched to the wagon. But it is claimed that the plaintiff himself was negligent, and, therefore, should not be allowed to recover. It is an unyielding rule that a plaintiff, prosecuting for the negligence of another, should himself be without any misconduct or fault, and should have used ordinary care. An action cannot be maintained when an injury has resulted from the negligence of both parties. It is the duty of every person to take care of his own safety (*Fox v. Glastenbury*, 29 Conn. 204), and in the case of *Cogswell v. Baldwin*, above cited, it was held, that if the injury to plaintiff's horse was occasioned by his own negligence, the plaintiff would not be entitled to recover. But I see nothing in this case which should charge the plaintiff with any want of ordinary care, or implicate him in any negligence. Plaintiff was where he had a right to be—passing on the sidewalk. It is true he knew the vicious propensity of the horse, but he also knew that defendant kept him muzzled. He came suddenly on the animal, and instantly turned from the walk to pass him. He had a right to presume that the horse standing there was muzzled. In fact, he did not see the horse until he came up to him, and was bitten in the act of passing.

He was in no attitude to the animal from which any negligence could be imputed to him. He did not court the danger, or rashly expose himself to injury. In *Smith v. Pelah* (2 Strange, 1264), the Chief Justice ruled, "that if a dog once

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bites a man, and the owner, having notice thereof, keeps the dog, and lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person treading on the dog's toe."

Judgment affirmed.

CHARLES H. HUNT, RECEIVER OF THE RENTS AND PROFITS OF
THE REAL ESTATE OF EDWIN P. CHRISTY, DECEASED, v.
MORTON P. WOLFE.

A tenant holding over after the expiration of his term, impliedly holds subject to all the conditions of the original letting or lease, and this presumption inures to the benefit of the heir of the lessor.

In an action for use and occupation since the death of the lessor, brought by the receiver of his estate, the complaint alleged the original lease between the defendant and his lessor, and that the former "continued to occupy the premises on the same terms and conditions," after the expiration of the term of his lease: *Held*, a sufficient averment of the relation of landlord and tenant, and implying an agreement to pay the same amount of rent reserved in the lease. *Hdd, further*, that it was not necessary to allege in whom the fee had vested, or who was seized of it.

A complaint, in an action for the nonpayment of rent, against a tenant of an estate, brought by its receiver, failing to show that he had notified the tenant of his appointment as such receiver or that he had demanded the rent prior to the commencement of the action: *Held*, bad, on demurrer. He ought to give notice of his appointment, in order to protect the estate from payment to the wrong party, and the debtor from treating, in ignorance of another claim, with an apparent owner.

APPEAL from an order made at special term sustaining demurrer and dismissing the complaint, and from the judgment entered thereon.

The action was brought to recover rent. The plaintiff alleged, in his amended complaint, that Edwin P. Christy, on the 20th of June, 1859, being the owner of the premises No. 102

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Grand street, let the same by written lease to the defendant, for the term commencing June 20, 1859, and ending May 1, 1860, at the yearly rent of \$1,000, payable monthly in advance; that the defendant took possession under the lease, and continued to occupy the premises until May 1, 1864, upon the same terms and conditions, and that the rent was reasonable for the use and occupation of said premises. That defendant had not paid any rent upon the premises since May 1, 1862; Edwin P. Christy died on 24th May, 1862, seized of said premises in fee. That an action had been commenced in the Supreme Court for the appointment of a receiver of the rents and profits of the real estate of said Christy, to act pending a certain controversy before the surrogate in regard to the probate of the alleged will of said Christy, deceased. All parties having any interest in the premises, after the death of said Christy, either as heirs, devisees, or otherwise, were made parties to said action. That the plaintiff was appointed receiver, and entered upon his duties as such on the 26th February, 1864, with power to enter into and upon said premises, and to have the possession and control thereof, and to rent the same from year to year, and to take all necessary and proper measures for the recovery of the rents and profits thereof in arrear and unpaid, and "that there is now in arrear and unpaid from the said defendant to the said plaintiff, by reason of the premises aforesaid, \$1,916.59, with interest," and judgment is demanded for that sum.

The defendant demurred to the complaint, on the grounds:

1. That the complaint did not state facts sufficient to constitute a cause of action against the defendant for any claim or demand prior to 26th February, 1864.
2. That the complaint did not state facts sufficient to constitute a cause of action subsequent to that date.

At the special term judgment was ordered for the defendant on the demurrer, from which order and judgment the plaintiff appealed to the general term.

James J. Thomson, for appellant.

George W. Stevens, for respondent.

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BY THE COURT.—BRADY, J.—It is alleged in the complaint that Edwin P. Christy, being seized in fee simple of the premises mentioned in the complaint, let and rented them to the defendant, by an agreement in writing, from the day named until the 1st May, 1860, at the yearly rent of \$1,000, payable monthly in advance, and that the defendant entered into possession of the premises under that agreement, and continued in the occupation of them until the 1st May, 1864, upon the same terms and conditions; that is to say, at the rate of \$1,000 a year, payable monthly in advance, which was a reasonable rent for such use and occupation. That Christy died on or about the 24th May, 1862. That in August, 1863, an action was commenced in the Supreme Court, by Peter Gilsey and others, against Ruth Christy and others, the parties to which were the only persons having any interest in the premises, either as heirs, devisees, or otherwise, of the said Christy, to have a receiver appointed of the rents and profits of the real estate of which the said Christy died seized, to act as such during the continuance of a certain controversy then pending before the Surrogate of the city and county of New York, in regard to the probate of the alleged will of the said Christy. That on the 23d November, 1863, an order of reference was made to appoint such receiver, the Supreme Court having acquired jurisdiction of the action and all the parties thereto, with power to enter into and upon the said premises, and to have the possession and control thereof, and to rent the same from year to year, and to take all necessary and proper measures for the recovery of the rents and profits thereof in arrear and unpaid, and that upon the filing of the report of the referee, showing a compliance with the directions of that order, the receiver named should be vested with all his rights as such receiver. And that on the 26th February, 1864, the report of the referee, appointing the plaintiff as receiver, was filed, whereupon the plaintiff entered upon the duties of his trust, and has ever since acted as such receiver. Upon these facts the plaintiff claims from the defendant rent in arrear and unpaid the sum of \$1,916 $\frac{1}{100}$, but for what period, precisely, is not stated, although it is alleged that the defendant has not paid any rent due since 1st May, 1862. The defendant demurred upon several grounds, and which may be briefly stated as follows:

1. That the action of use and occupation will not lie unless the conventional relations of landlord and tenant existed.

2. That there is no averment in the complaint that any person named or referred to in it was seized of the premises on the death of Christy, or of any demise to the defendant, or that he occupied the premises by permission of any person after the death of Christy.

3. That there is no privity of contract between the plaintiff and the defendant, no averment that the latter occupied the premises by permission or by demise of the former, or that the plaintiff ever entered upon the premises after his appointment, or gave notice of his appointment, or of any attornment or request to attorn.

It is necessary to consider some of these objections. The defendant entered into possession of the premises under a written agreement, and continued to occupy upon the same terms and conditions, that is to say (following the language of the complaint), at the rate of one thousand dollars a year, payable in advance. If the complaint had omitted the last averment, the defendant by holding over after the expiration of his term, impliedly held subject to all the conditions of the agreement applicable to his new situation (*Jennings v. Alexander*, 1 Hilt. 154; *Osgood v. Davey*, 13 Johns. 240; *Story on Contracts*, § 859; *Digby v. Atkinson*, 4 Camp., 275; *Williams v. Sherman*, 7 Wendell, 109; *Hall v. Southmayd*, 15 Barbour, 32; *Pierce v. Pierce*, 25 Barbour, 243). This presumption of the common law inures to the benefit of the heir of the lessor (*Digby v. Atkinson, supra*), and is in accordance with the rule that the rent follows the reversion. It is also provided by statute that the heirs and personal representatives of a lessor shall have the same remedies for the nonperformance of any agreement contained in the lease, or for the recovery of rent, as such lessor might have had (1 Rev. Stat. 747, § 23). Under the old system of pleading, the form of action would have been assumpsit upon the implied promise to pay the rent, the amount of which would be determined by recourse to the lease. It may be said that the statute does not apply to a case in which the action is not upon the lease itself, but such an interpretation is neither within the

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letter nor spirit of the law. The remedy is given upon any agreement in the lease contained, and the action of *assumpsit* on the implied obligation rests necessarily upon the lease, without reference to which the amount of rent cannot be proved, and the implied agreement to pay it established. It is therefore the bases of the action, and so inseparably connected with the subsequent implied promise that no recovery can be had without proving its existence. The action is therefore substantially upon an agreement in the lease contained. It is not, however, essential to the plaintiff's recovery that the statute should apply to the remedy sought to be accomplished in this case. I think the allegation that the defendant continued to occupy on the same terms and conditions is an averment of a subsisting agreement by which the relation of landlord and tenant is shown, but I have treated the case as one the facts in which show an implied agreement to the same effect. At common law debt would lie for the use and occupation, and, after the Statute of 11 Geo. II, c. 19, *assumpsit*, where the holding was upon an agreement, not by deed, either express or implied (Cases, *supra*). It follows then as a legal result that a promise to pay one thousand dollars per annum being implied from the holding over by the defendant, and such promise inuring to the benefit of the heir, as the owner of the reversion, and entitled to the rents, issues, and profits of the land, and he having all the remedies for its collection which the lessor might have had, that he could maintain an action for the rent which accrued subsequent to the death of the testator Christy. For these reasons, the objection that the action for use and occupation cannot be maintained fails, because there is an implied agreement between the defendant and the heir of Christy, or owner of the reversion, that he will pay the rent of one thousand dollars per annum, and the relation of landlord and tenant is created thereby. There is, however, another reason why that objection cannot avail the defendant. This is not exclusively the action contemplated by the cases relating to the remedy for use and occupation to which we have been referred. It has been considered in reference to those cases, however, and the plaintiff's right so far sustained. This is an action directed by a court of competent authority, which has acquired jurisdiction

of the subject-matter of the claim made herein, and of all the parties having any relation thereto or interest therein. The order of that court makes the plaintiff the representative of the heir, devisee, or personal representative, and of the person, if any other person exist, entitled to the rents of the land occupied by the defendant. He is to receive such rents as an officer of the court. He is appointed for the benefit of all parties, and the money in his hands is in *custodia legis* for whoever can make out a title to it (Edwards on Receivers, 2d edit., and cases cited, pp. 2, 3). The court itself has care of the property, therefore, in dispute, the appointment of the receiver being an equitable execution (Jeremy's Eq. Jur., 249). He was appointed in consequence of a controversy on the subject of the estate of which the premises in question form a part, and he could not allege under the circumstances with certainty in whom the fee had vested or who was seized of it, and it was not necessary that he should. It is sufficient that the seizen of the defendant's lessor is alleged, and the due appointment of a person representing all parties in interest, for the purpose, among others, of collecting the rents of the estate in arrear, which in this case would belong to the heir, inasmuch as nothing was due at the time of Christy's death. Some person, for aught that appears, has a right to such payment, and the Supreme Court has directed the plaintiff to collect them for that person. The action is, therefore, one to recover rent due, that it may, when received, be held in *custodia legis* for the benefit of the person whose claim to it may be established. The plaintiff represents that person, whether heir, devisee, or personal representative. The complaint contains for these reasons sufficient to justify this action so far as the right of the plaintiff to recover, and the obligation of the defendant to pay, is concerned, but the difficulty which the former has to encounter is the omission of any notice of his appointment or demand of the rent. The statute provides that where any lands or tenements occupied by a tenant, or the rents or profits or any other interest therein, shall be conveyed by the landlord of such tenant, the latter shall not be liable to such grantee for any breach of the condition of the demise until he shall have had notice of such grant (1 Rev. Stat. 739, § 146); and we have held that an action cannot be maintained

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for rent due against a tenant by the grantee of his landlord prior to notice of the transfer. There is no reason why a similar rule should not be applied to the plaintiff, although that statute may not embrace him within its letter or spirit. If the commencement of the action is a sufficient notification or demand, then the defendant must pay the costs of the action on payment of the money into court, although he was not aware to whom it should have been paid, and is subjected to a penalty without default on his part. The operation of such a rule would result oppressively and cannot be adopted. There is no precedent for it that I have been able to find. As a general rule the receiver is obliged to give notice of his appointment to accomplish two objects: to protect the estate from payment to the wrong party, and the debtor from treating, in ignorance of another claim, with the apparent owner. The demurrer was properly sustained, and the judgment of the special term should be affirmed.

ALANSON T. BRIGGS v. THE MAYOR, ALDERMEN, AND COMMON-
ALTY OF THE CITY OF NEW YORK.

The comptroller of the city of New York has no authority, independently of the common council, to bind the corporation by contract; and, being an officer whose powers are prescribed by general laws, every one dealing with him is charged with notice of the limitations of his authority.

APPEAL by the defendants from a judgment rendered at trial term on a verdict.

The action was brought to recover rent for the use and occupation of certain premises. The facts are fully stated in the opinion of the court. On the plaintiff's resting, the defendants moved to dismiss the complaint, for the reasons: 1. That there was no resolution of the common council authorizing the comptroller to lease this vault. 2. That there was no previous appropriation made covering the expenses. The motion was denied. The jury rendered a verdict for plaintiff, and judg-

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ment was entered accordingly. Defendants appealed to the general term.

Richard O'Gorman, for appellants.

The action of the comptroller, in hiring the vault in question, is insufficient to bind the corporation; because, as is admitted, no resolution had been adopted by the common council authorizing him to hire it, and the comptroller possesses no power to make such a contract in behalf of the city until directed by the common council (see sec. 38, Charter of 1857, in Valentine's Laws, p. 278; Revised Ordinances of 1859, chap. 8, art. 2, sec. 14). And the corporation is not liable for, or bound by, the acts of its officer, the comptroller, exceeding the authority conferred upon him (see Hoffman's "Laws Relating to the City and County of New York," vol. 1, p. 151, *et seq.*; *People v. Stout*, 23 Barb. 349; *Altamus v. The Mayor &c.* 6 Duer, 446; *McSpedon v. The Mayor &c.* 15 How. Pr. 462; *Swift v. The City of Williamsburgh*, 24 Barb. 427; *Brady v. The Mayor &c.* 2 Bosw. 173; *Quinn v. The Mayor &c.* [M.S. opinion by Cardozo, J.]; *Farmers' Loan & Trust Co. v. The Mayor &c.* 4 Bosw. 80). The comptroller is a public officer, performing, under various laws, certain functions, and having no power except as he acts in conformity with them (*Smith v. The Mayor &c.* 4 Sandf. 221; *Brady v. The Mayor &c.* 2 Bosw. 173; *Murphy v. Commissioners of Emigration*, 27 How. Pr. 44; *Bonesteel v. The Mayor &c.* 22 N. Y. Rep. 162).

Van Cott & Stewart, for respondent.

BY THE COURT.—BRADY, J.—In May, 1861, the plaintiff executed a lease to the defendants of the second floor of the building No. 4 Fourth avenue, for a term of years, at a rent named. Mr. Haws then being the comptroller of the city, executed the lease on behalf of the defendants. The premises secured by the lease were intended for the use of the Inspector of Unsafe Buildings, and were hired in pursuance of a resolution of the common council, passed in due form. After the

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lease was executed, it was discovered that no provision for a vault had been made, and Mr. Haws directed an indorsement of the lease as follows: "It is agreed that the vault occupied by Mr. Phillips is to be occupied by the present lessees, at fifty dollars a year rent. October 29, 1862." It was admitted, on the argument, that no resolution had been passed directing or authorizing the contract made as above, for the vault. It will be observed that the indorsement bears date 29th October, 1862, long after the lease was executed. When the comptroller signed the original lease, he exhausted the power conferred upon him. He had hired premises for the inspector of unsafe buildings, and, if any thing more was necessary, it was his duty to have communicated the fact to the common council, and to have received their authority to make a further contract. He possessed, independently of that body, no power to incur, in their name, any such obligation (sec. 38, Charter of 1857, Valentine's Laws, 278; Revised Ordinances 1859, §§ 13, 14, 15, of chap. 8, pp. 177, 178). And the plaintiff was chargeable with notice of the limitation of official authority imposed by general laws (*Donovan v. The Mayor &c. of New York*, 33 N. Y. 291). The agreement being void so far as the defendants are concerned, the plaintiff had no claim against them for the use and occupation of the premises. His remedy was against Mr. Haws, he having contracted for the defendants without competent authority. These conclusions render it necessary to reverse the judgment entered in this case. It is not at all certain that even if the hiring of the vault were authorized, we might not be required to reverse the judgment upon the ground that the plaintiff failed to show an appropriation to cover the expenditure necessary to pay for the vault, under the decision in *Donovan v. The Mayor &c.* (supra). It is not necessary to decide that point, however.

The judgment should be reversed.

THOMAS S. JONES v. THE FIREMEN'S FUND INSURANCE COMPANY.

The defendants issued a policy of insurance upon plaintiff's "stock of fireworks—hazardous and extra hazardous." In the body of the policy, there was a printed provision, which declared "that the policy shall be null and void, whenever any article shall be kept in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for in this policy." The plaintiff kept certain dangerous "colored lights," contrary to the provisions of a city ordinance. These "colored lights" having ignited, and caused the loss. *Held*, in an action upon the policy, that the written provision of the policy, insuring fireworks, &c., was not repugnant to, and did not amount to a waiver of, the printed condition of the policy; the meaning of the policy being, that the plaintiff might keep only such a stock of fireworks, and of the kind and quantity, as it was lawful to keep under municipal regulations; and, having violated a regulation, in keeping the colored lights which caused the fire, that the plaintiff could not recover.

An ordinance enacted under the general authority given by the city charters and the Act of 1806, to the common council, forbidding the keeping of certain fireworks within the city limits, is binding on all the inhabitants, and has all the force and effect of a law.

APPEAL by the defendants from a judgment at trial term.

The action was brought by the plaintiff to recover the loss by fire of certain property insured by the defendants.

The policy was dated the 14th day of February, 1865, and for \$23.50 insured the plaintiff against loss or damage by fire to the amount of \$2,500 on his stock of fireworks, ordnance stores, and other merchandise, hazardous and extra hazardous, contained in the brick building, No. 16 John street, New York.

By the printed terms of the policy, it was provided that "whenever gunpowder, or any other articles subject to legal restriction, shall be kept on said premises in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for therein, this policy shall be null and void; and that the company will not be answerable for any loss in consequence of neglect of or deviation from the laws or regulations of police

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made to prevent accidents from fire, in places where laws and regulations on the subject exist."

The corporation of the City of New York, in pursuance of legal authority, had enacted an ordinance forbidding the storage of fireworks, excepting that "fireworks, excepting colored pot and lance wheels, and other works of brilliant colored fires, not exceeding in value \$1,000, may be kept for retailing within the fire limits, from the 10th of June to the 10th of July of each year, and no longer, except by permission, such permission to be granted by the chief engineer of the fire department."

Notwithstanding, plaintiff did keep fireworks, and had other works of brilliant colored fires in his store on the 25th day of August, 1865, and they exploded and set fire to the premises.

The cause was tried before Judge Cardozo and a jury on the 8th of February, 1867, and the jury under the direction of the court found a verdict for the plaintiff, the exceptions to be heard at the general term in the first instance.

Varnum & Turney and *Livingston K. Miller*, for appellants.

I. The plaintiff was engaged in an act forbidden by law; this violation of statute was the cause of the loss, and the plaintiff cannot recover (1 Comyn on Contracts, quoted in *Otis v. Harrison*, 36 Barb. 210). The ordinance had the same effect as a general statute of the State (*Bell v. Quin*, 2 Sand. S. C. R. 146; *Beman v. Tugnot*, 5 Id. 153).

II. The privilege to keep fireworks did not permit keeping works of *brilliant colored fires*. The terms of the policy expressly forbade it, as being contrary to law. The policy was framed with reference to ordinary fireworks, and the plaintiff had no legal right to subject defendants to the additional and fatal risk of other and explosive articles. This keeping, being prohibited by the policy without the statute, would preclude a recovery by the plaintiff (*Westfall v. Hudson River F. Ins. Co.* 12 N. Y. 289; *Mead v. Northwestern Ins. Co.* 7 N. Y. 530; *St. John v. Am. Fire Ins. Co.* 11 N. Y. 511).

III. The printed conditions not having been complied with, the plaintiff cannot recover. They are part of the policy (*Roberts v. Chenango Co. Mut. Ins. Co.* 3 Hill, 501; *Murdock v. The Chenango Co. Mut. Ins. Co.* 2 N. Y. 210; *Hayward v. Liverpool & London Ins. Co.* 7 Bosw. 385).

IV. The plaintiff should not recover for that which he himself did, in violation of the contract, of the statute and of public policy (*Hunt v. Knickerbocker*, 5 Johns. 327; *Parkin v. Dick*, 11 East. 502; *Westfall v. Jones*, 23 Barb. 9; *Seneca Co. Bank v. Lamb*, 26 Barb. 601; *Barton v. Port Jackson Plank Road Co.* 17 Barb. 404; *Griffith v. Wells*, 3 Denio, 226).

Theo. Stuyvesant and *A. A. Phillips*, for respondent.

I. The appellants having, under the policy, insured the respondent against loss or damage by fire on "stock of fireworks" &c., he had a right to have in his store such goods as are known under the general designation of "fireworks." (a.) This is true although the keeping of such goods was prohibited by the printed terms of the policy as extra hazardous (*Bryant v. Poughkeepsie Mutual Ins. Co.* 17 N. Y. 200; *Harper v. Albany Mutual Ins. Co.* Ib. 197). (b.) The insurers knew of the printed terms of the policy and yet contracted to insure his stock of fireworks, &c. The printed conditions, therefore, cannot override this special contract (*Mayor &c. of N. Y. v. Brooklyn Fire Ins. Co.* 41 Barb. 231). (c.) The prohibition contained in the policy against keeping or storing any goods, &c., denominated hazardous or extra hazardous, &c., is a conditional one, viz., "except as herein specially provided for."

II. The ordinance is not wholly prohibitory, but regulates the keeping and storing of fireworks. The question as to whether the respondent was guilty of a violation of the ordinance cannot affect or impair the contract, but is a question between the city authorities and the respondent (*Brown v. Buffalo & State Line R. R. Co.* 22 N. Y. 191).

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BY THE COURT.—DALY, F. J.—The written part of a policy prevails over that which is printed where the two are repugnant (*Harper v. The Mutual Ins. Co.* 17 N. Y. 198); but the written provision in this policy insuring a stock of fireworks upon the premises, is not repugnant to the printed provision which declared that the policy should be null and void whenever any article should be kept on the premises in quantities greater than the law allows, or in a manner different from that prescribed by law; unless said use or keeping was specially provided for in the policy. By an ordinance of the city, fireworks, not exceeding in value one thousand dollars, except fireworks of a particular description, which are specified, may be kept for retail within the fire limits, from the 10th of June to the 10th of July, and longer if permission is granted by the Chief Engineer of the Fire Department. "Colored, pot and lance wheels and other works of brilliant colored fires," are the fireworks excepted, and the keeping of them, at any time, or under any circumstances, within the fire limits, is, as I construe the ordinance, forbidden. This ordinance is in the nature of a police regulation, enacted under the general authority given by the city charter to the common council to pass "laws, statutes and ordinances for the good rule and government of the city" (Dongan's Charter, § 7; Montgomerie Charter, § 14) and by the direct authority of the act of 1806, to pass as often as they deem it necessary, ordinances "to regulate the keeping of combustible or dangerous material within the bounds of the city" (Valentine's Law relating to the city of New York, p. 452, § 15), which ordinances are binding upon all the inhabitants of the city (Dongan's Charter, § 7) and have, therefore, within its limits, all the force and effect of laws. The defendants having provided in the body of the policy, that it should be void if any article subject to legal restriction should be kept in greater quantities than the law allows, or in a manner different from that prescribed by law, unless the keeping of it was provided for in the policy, it is not to be assumed that the defendants meant by the written provision insuring a stock of fireworks, to provide by that provision, for the defendants keeping a particular kind of fireworks, the keeping of which, within the building, was forbidden by a municipal law; the more

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especially as one of the conditions upon which the insurance was made, was to the effect, that the defendants were not to be answerable from any loss arising in consequence of neglect of or deviation from the law, or regulations of police, made to prevent accident from fire, in places where law and regulation on the subject exist.

The defendants insured, to the extent of twenty-five hundred dollars, a stock of fireworks, ordnance stores, and other merchandise, hazardous and extra hazardous. Fireworks and ordnance stores do not come under the head of the articles enumerated in the policy as hazardous or extra hazardous. Ordnance stores, as such, are not embraced in any of the classes specified, and fireworks, except crackers in packages, are enumerated in the policy under the head of *specially* hazardous, for which an extra and the highest rate of premium is charged. The schedule of the plaintiff's loss shows that his stock consisted of guns, pistols, cannon, swords, military equipments, uniforms, &c., amounting in all to over \$22,000, and the fireworks constituted a comparatively small part of it, not more in value than he was allowed to keep under the ordinance, that is to the amount of \$1,000. It is therefore more reasonable to suppose that what was meant by the language employed, was a stock of fireworks of the kind, and within the quantity, which the plaintiff might lawfully keep under the municipal laws of the city, and was not meant to embrace fireworks of a certain and dangerous kind, which he and all other inhabitants of the city were forbidden to keep within the fire limits.

After the insurance was effected, the plaintiff had an order for a quantity of signal lights, and after filling a box, he placed about half a dozen of these signal lights, which, it was conceded, came within the description of "works of brilliant colored fires," upon a shelf in the store. About four or five days afterward, as the plaintiff's brother was sitting in the store, he was struck on the back with something, hearing at the same time a hissing noise, upon which he turned around, and found the signal lights upon the shelf on fire, and in ten minutes after, the store was enveloped in flames. It also appeared in evidence that the plaintiff was in the habit of keeping signal lights of this description all the year round.

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The fire, therefore, and consequent loss, was produced by the plaintiff neglecting to observe the corporation ordinance. It shows the utility of such an ordinance, and the propriety of the defendants making it a condition of the insurance that they would not be responsible, if the fire should arise from the neglect of, or deviation on the part of the insured from, ordinances like this, passed to prevent accidents from fire. Their observance lessens the risk taken by the insurer, and where an insurance company has stipulated for their strict observance, and that no article shall be kept on the premises in a manner different from what the law allows, it would require something more explicit in the written part of the policy than is contained in this to justify the conclusion that the company waived these two printed conditions. A new trial should be ordered.

New trial ordered.

JEREMIAH CURTIS, GEORGE N. CURTIS *and* J. W. CURTIS *v.*
JAMES BRYAN.

Equity will restrain a person from fraudulently using another's trade-mark, and from imposing his goods thus trade-marked upon the public.

One who in and by his trade-mark makes representations which deceive the public cannot ask a court of equity to restrain the use of such deceptive trade-mark by another. But a mere false or exaggerated statement in a public advertisement of the manufactured article, tending to recommend its use to the public, will not deprive the owner of a right to be protected in the exclusive use of his trade-mark.

One who has fraudulently imitated the trade-mark of another, and offered for sale his own goods as those of the owner of the trade-mark, cannot be heard to raise the objection that the latter's goods are injurious to health.

APPEAL from an order made at special term, denying a motion to dissolve an injunction. The facts in this case appear in the opinion of the court.

Hatch & Hinsdale, for appellant.

Sherwood & Howland, for respondents.

BY THE COURT.—VAN VORST, J.—Previous to the year 1844, Mrs. Charlotte N. Winslow prepared a composition for children teething, which she used with success. In 1844, she gave the recipe to her son-in-law, Jeremiah Curtis, one of the plaintiffs in this action, who commenced its manufacture and sale, under the name of “Mrs. Winslow’s Soothing Syrup,” and with the approval of Mrs. Winslow, made that his trade-mark. Afterward Jeremiah Curtis associated with himself in business Benjamin A. Perkins. Curtis and Perkins, from and after the year 1845, prepared, manufactured and sold the preparation under the same name and trade-mark. Before the year 1852, they used a wrapper and label generally resembling that now in use. In 1852, they invented a wrapper, which has been continued from that time to the present.

In the year 1855, Perkins retired from the copartnership, and George Newman Curtis and Jeremiah W. Curtis, with the plaintiff Jeremiah Curtis, became the proprietors of said article, title, and name, and are the present proprietors of the recipe for the medicine, and the trade-mark.

The preparation is put up in glass bottles, about five inches in length, and one inch in diameter, with the words “Mrs. Winslow’s Soothing Syrup” stamped upon them. Each bottle has on it a label in the English, French, German, and Spanish languages, and is inclosed in a wrapper of yellow paper, with the Government proprietary revenue stamp of the plaintiffs thereon. Each label has on it two vignettes, and the words “Mrs. Winslow’s Soothing Syrup, for children teething.” The plaintiffs claim, that the preparation is made of pure materials, and with great care; that they have made efforts, during many years, to introduce the preparation into general use in the United States, and foreign countries; that they have expended in such efforts, and in advertising, eight hundred thousand dollars, and have caused it to be generally known by its distinctive name. Plaintiffs claim that the sales of the article, under its peculiar name and title, have at all times steadily and rapidly increased, so that they sell over one million and a half bottles annually, and their annual receipts exceed \$300,000. The preparation is well and favorably known in New York,

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and is purchased at wholesale by druggists, chemists, and apothecaries. It appears, by the evidence, that the medicine has given satisfaction, and has the reputation of being a safe and valuable preparation.

The defendant in this action, since the first day of January, 1867, has commenced the manufacture of a preparation, in color and appearance resembling that of the plaintiffs, under the name of "Winslow's Soothing Syrup, for children teething." Defendant's mixture is put up in glass bottles of nearly the same length, and of the same diameter, as those used by plaintiffs, with the words "Mrs. H. M. Winslow's Soothing Syrup" stamped upon them. The label on the defendant's bottle is of the same size, color, and style of printing as that of the plaintiffs. The printing on the label is in the English, French, German, and Spanish languages, and is in the same words as those on the plaintiffs' label. The bottle of the defendant is inclosed in a wrapper of paper, with a stamp thereon, having the general appearance and style of the revenue proprietary Government stamp of the plaintiffs, and has figures resembling plaintiffs' engraved thereon. The defendant having thus prepared his article, has introduced same for sale, and is selling same, under the name of "Winslow's Soothing Syrup."

Except there be some legal justification for his acts, the defendant, under the well-settled principles as clearly and repeatedly announced by courts of equity, is infringing upon and invading the plaintiffs' rights. A trade-mark is property, and the proprietor thereof should be fully protected in its enjoyment, and in all the benefits and advantages which it confers. It is well settled by the determination of the courts of this country, and the English and French law is the same, that a person may, by priority of appropriation of names, letters, signs, figures, or symbols of any kind, to distinguish his manufacture, acquire a property therein as a trade-mark, for the invasion of which an action will lie, and in the exclusive use of which he may have protection by injunction (*Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. 599).

The defendant could have had but one object in so closely imitating the article prepared by plaintiff. His use of a bottle

similar in size and form ; his use of the labels in the different languages, and in the same words ; the adoption of a stamp similar to that used by plaintiffs, and his selling his article under the name of " Winslow's," or " Mrs. H. M. Winslow's Soothing Syrup," all clearly demonstrate that he designed to take advantage of the reputation which the plaintiffs had, by large expenditures of money, and great and persistent efforts, established for their article. It is quite evident that the defendant would seek to avail himself of, and turn to his own account, the labor and expense which the plaintiffs have borne for years, to bring their article into favorable notice and general use. By the arts he used, defendant would have the public believe that the article he was selling was the plaintiffs', and he would dispose of it as such.

Courts of equity do not regard with favor such practices, and will restrain a party from indulging in them. The direct consequences of the defendant's acts is to deceive, and a party is presumed to intend the consequences of his acts.

The imitation of the plaintiffs' trade-mark is so close, and the manner in which defendant's article is put up so nearly resembles the plaintiffs' article and mark, that the law must presume it to have been resorted to for the purpose of inducing the public to believe the article is that of the plaintiffs, whose trade-mark is imitated, and for the purpose of supplanting him in the good-will of his business (*Taylor v. Carpenter*, 2 Sand. Ch. R. 611, 612; *Millington v. Fox*, 3 Myl. & C. 338).

In *Amoskeag Manufacturing Co. v. Spear* (supra), the court says: "An injunction ought to be granted whenever the design of a person who imitates a trade-mark, his design either apparent or proved, is to impose his own goods upon the public as those of the owners of the mark ; and the imitation is such that the success of the design is a probable, or even a possible, consequence."

But the case is relieved of all doubt as to the intention of the defendant in so preparing, putting up, marking, and introducing his article. The proof shows clearly that defendant stated at the time that the stamp he had placed on his bottle was intended to imitate the Government stamp upon the plaint-

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iffs' article, and that he intended to procure a Government stamp like the one used by the plaintiffs, and that he also expected to sell his article on the demand made, and the advertising done, for "Mrs. Winslow's Soothing Syrup," by Jeremiah Curtis & Sons. To justify the use by him of the name of "Winslow," in connection with the article introduced by him, the defendant claims that a variety of soothing syrups prior to 1843, called "Winslow's Soothing Syrup" for children, was manufactured, prepared, and sold by John M. Winslow, a druggist of the city of Rochester, and that printed circulars bearing the name of such medicine were extensively circulated through the Northern States. The defendant avers, in his answer, that he purchased the formula of his remedy from John M. Winslow, on the 20th of March, 1867. That John M. Winslow is the original and first manufacturer of a similar medicine, bearing his name as originator. That as early as 1842, Winslow invented, and used his name in connection with the medicine.

I am entirely satisfied that this claim of the defendant, under the proofs in the case, is wholly unfounded, and is fraudulently put forth.

[After reciting the evidence tending to prove that the defendant's claim to a prior use of the trade-mark was unfounded, the court proceeded:]

The defendant, in his answer, sets up two other matters of defense to the plaintiffs' action.

The first, that the advertisement of the plaintiffs, in respect to their medicine, is false; that in the notices which the plaintiffs have given in the public prints, of their compound, they have made statements which are not true. It is well and clearly established that if a person, in and by his trade-mark, makes representations which deceive the public, he cannot appeal to the equitable interposition of the courts in his own behalf for protection in the exclusive enjoyment of such false trade-mark.

It was so decided in *Fetrich v. Wells* (13 How. Pr. 385), which was a case in which the plaintiff endeavored to restrain the defendant from imitating and using his trade-mark. The

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plaintiff was manufacturing and selling an article of liquid soap, compounded of palm oil, potash, alcohol and sugar, highly scented, under the name of "Balm of a Thousand Flowers." The name itself contained a falsehood, and was used to deceive the public. (*Florell v. Harrison*, 19 Eng. L. & Eq. R. 15; but see *Holloway v. Holloway*, 13 Bea. 213; *Stewart v. Smithson*, 1 Hilton, 119.) But in all these cases, the fraud appeared in the trade-mark itself. I cannot understand how the right of a plaintiff to be protected in a trade-mark adopted by him is to be affected by advertisements of his article in the newspapers. The trade-mark is one thing, the notices or commendations of his medicines, when the inventor offers them for sale, is quite another. If the trade-mark contained a false statement, and the advertisements of the plaintiffs tended to establish it, they might be used for that purpose; and, except as it bore on that question, it would not answer to determine the right of a plaintiff to protection in his trade-mark by the standard of credit allowed to an advertisement of the qualities of the article.

The advertisement particularly criticised is in these words: "Mrs. Winslow, an experienced nurse and female physician, presents to the attention of mothers her Soothing Syrup." The objection is, that the advertisement holds out the idea that Mrs. Winslow is still living, and herself offers the medicine, whereas the truth is, that she has been for many years dead. And furthermore, the defendant denies that she was, in her lifetime, an experienced nurse and female physician. Neither of these statements, whether true or false, affect the trade-mark one way or the other. If they are not true, they do not impeach or throw any discredit upon it. But with respect to the advertisement itself, while it is not literally true that Mrs. Winslow presents the medicine herself, still the fact is, that she did, in her lifetime, prepare the formula for the preparation, and did reduce it to practical use, and did transfer the same to her son-in-law, Jeremiah Curtis, and did acquiesce in and adopt the use by him of her name in connection with the mixture, and her name properly indicates its true origin. The names of the plaintiffs, as the present proprietors of the article, are plainly printed on each package, which clearly avoids all appearance of deception.

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The case does show clearly that Mrs. Winslow was an experienced nurse, that she was skilled in the cure of the diseases of women and children, and that she acted in and conducted a certain class of cases herself as a female physician.

The other defense interposed by the defendant is, that the medicine is not what by the advertisement it purports to be—that it is not perfectly safe or harmless, but, on the other hand, it contains ingredients which are injurious and baneful to children.

It is difficult to conceive upon what principle of equity this defendant should be heard to raise this objection. His own conduct in regard to the subject-matter is an unequivocal concession to the goodness and value of the plaintiffs' article. He interposes this objection, to avoid an injunction which restrains him from imitating the plaintiffs' article. After the plaintiffs' preparation had been in use for nearly twenty-five years, its sale having steadily increased during all that time, the defendant appears, and places upon the market an article which, by the practices and arts to which he has had recourse, he would have the public purchase as the plaintiffs' article.

If the article was not a good one, why should the defendant imitate it? If it was injurious to health, it is not reasonable to suppose that a prudent man would venture to introduce a similar article under the same name, and hope to succeed.

The defendant has not supported his charge by any proof or chemical analysis of the compound by any expert. On the other hand, the plaintiffs say that the composition of their article is a valuable secret, which they possess, and intend to preserve. They deny that the composition of the article is truly set forth by the defendant. They aver that it is made of pure materials, and is carefully prepared. Plaintiffs have also produced affidavits of thirty druggists and apothecaries of the city of New York, and several persons from other places, who have been engaged in the sale of plaintiffs' medicines for many years past, some of them as long as fifteen years, and they concur in stating that the plaintiffs' preparation has been well and favorably known in the drug trade during all the time in which they have been engaged in selling it; that it has given universal satisfaction to the public, and has a very high reputation as a safe and valuable medicine.

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Experience is an excellent teacher, and the fair trial of an article will furnish unerring evidence of its worthlessness or value. It is obviously true that if a medicine can stand the test of twenty years of experimental use, and grow steadily and constantly in favor, its properties cannot be injurious. But, as before observed, the good faith of this defendant, in raising the objection, may reasonably be questioned, and I am satisfied that it does not lie in his mouth to make it. If a man's acts are any indication of his belief, on any subject, the conduct and admissions of the defendant constitute a complete refutation to this objection. A man's faith is shown by his works.

The defendant is now properly restrained from using or interfering with the plaintiffs' trade-mark. The order of Judge Brady, denying the motion to dissolve the injunction, from which this appeal is taken, is affirmed, with costs.

JOSEPH STOUVENEL *and* FRANCIS STOUVENEL v. MARGARET A. STEPHENS.

Although the law presumes that one who is missing is living, until seven years have elapsed, yet circumstances may be shown from which a jury will be warranted in assuming that he was dead at a time within that period.

Hearsay evidence is only admissible to overrule the presumption of life, after a considerable lapse of time.

Where there is evidence of a character, considered by itself, to create a reasonable probability that a party was dead on a certain day, and the evidence that he was seen afterward is contradictory: *Held*, that every thing, however slight, which tends to strengthen the former evidence—such as the habits of the party, &c.—should be received in evidence.

Where the report of one referee, finding that the party was dead at a certain time, was set aside for the admission of incompetent testimony, and the report of the next referee, finding that he was alive at that time, was set aside, for the rejection of evidence that ought to have been received, a further reference was denied, though the case was, in its nature, referable, and it was ordered to be tried by a jury, for the reason that the conclusion of twelve men upon such a point, under such circumstances, would be more satisfactory than the finding of a referee.

APPEAL by the plaintiffs from a judgment entered on a report of a referee.

The action was brought against the defendant as surety for

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one Charles Brady, on a lease made to him by the plaintiffs, on the 7th day of January, 1858. The answer admitted that the defendant became surety, but set up that she was then a married woman, the wife of one Hobby R. Stephens, and hence the agreement was void. The action was tried before William F. Allen, Esq., as referee. On the trial, it was shown that the defendant's husband was living in December, 1856, and the plaintiffs sought to show that he had died about that period, by introducing testimony as to his habits, the state of the weather at the close of the year 1856, the common rumor and report of his death, and belief of his relatives therein, and their action thereon—all of which was excluded by the referee, who, at the close of the trial, found, among other things, "that the defendant had, before the making and execution of the said covenant, intermarried with one Hobby R. Stephens, and was then his lawful wife, and the said Hobby R. Stephens was then living. The fact that the said Hobby R. Stephens was then living is based upon the presumption of law in favor of the continuance of life, with proof tending to show that he was seen alive after that day, and in the absence of any satisfactory legal proof that he was then dead."

From the judgment entered upon the report in favor of the defendant, the plaintiffs appealed to the general term.

S. B. Helbert Judah, for appellants.

T. E. Stewart and *T. C. T. Buckley*, for respondent.

BY THE COURT.—DALY, F. J.—As it was proved by all the witnesses that the defendant's husband was living in December, 1856, the burden of proof was upon the plaintiffs to show that he was dead on the 7th of January, 1858, when the defendant became surety for the performance of the covenants in the lease made by the plaintiffs to Brady, the presumption of law being, unless the contrary is shown, that the party continues alive until seven years have elapsed from the time when he was last seen (*Wilson v. Hodges*, 2 East, 312, and Wharton's note in the American edition of East, of 1848). The hearsay evidence which the referee excluded could not be received to show that

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Stephens was dead in January, 1858, though it might be receivable to establish the fact of his death after a considerable lapse of time (see the cases referred to in our former decision in this case, 26 How. 244). The point, however, upon which I entertain a doubt was the propriety of excluding the evidence of Stephens' habits prior to the time of his disappearance, especially as the evidence of the witness Wood, who swore that he saw Stephens in this city after the defendant had entered into the contract, was shaken in the matter of dates, he having sworn upon the former trial that the time when he last saw Stephens was in January, 1860, and upon the present trial that it was in January, 1859. This was the only witness who testified that Stephens was alive after the defendant entered into the contract, while among his intimate friends and relatives nothing had been heard of him after he had been last seen by them, in the winter of 1856, when, as described by one of them, he was "in a horrible condition, ragged, dirty, almost barefoot." He was a man of intemperate habits, and a few days before he was seen in this condition—that is, in December, 1856—he was not allowed to come into the house where he had boarded, in consequence of the filthiness of his appearance, and to which he never came back, although his trunk was there, containing his clothing, and from \$20 to \$30 in money. In the following months of January and February, both his brothers, his sister and his father searched diligently for him, by inquiring at all the places where he used to visit, of the person with whom he last worked, of the one with whom he boarded last, and at two of the public markets, where he was accustomed to work, of persons who knew him, and with whom he had done business, but they could learn nothing of him. His periods of prolonged intemperance, or, as the witnesses called them, "sprees," upon one of which he went when he left the last place where he was employed, the condition in which he was when he was seen in the months of December, 1856, and January, 1857, and the fact that his relatives and friends have not been able to learn any thing of him since, was evidence tending to show that he may have died about that time, from exposure in the streets, and have been interred by the

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public authorities as an unknown person, a circumstance not of unusual occurrence in a large city like this. Three witnesses testified that they had seen him after this period. The first was the defendant herself, who testified that she saw him in this city, in July or August, 1857; but she admitted that she had sworn, upon the former trial, that the last time she had seen him, to the best of her knowledge, was in September, 1856. The next witness was Wood, upon whose testimony I have already remarked; and the last witness, Toppy, saw him in the Fourth avenue, "on a spree," and said that he *rather thought* it was in 1857, toward January, 1858, but added, It is so long ago, I could not bear it in mind. This witness was asked if he had not stated immediately before being called as a witness, that the last time he saw Stephens was between the 24th of December, 1856, and January, 1857, but the referee excluded the question, which I think he might with propriety have admitted, although the witness was called by the plaintiff, the question being the accuracy of the witness' recollection as to the precise year when he saw Stephens, upon being interrogated respecting it seven years afterward. But, independent of this, it is manifest from the perusal of this witness' testimony, that he had simply an impression, and not an accurate recollection, as to the exact year when he saw Stephens for the last time.

It was certainly remarkable, if Stephens was in the city at the periods when these witnesses declared they saw him, that he should not have been seen about the markets, where he obtained his livelihood, by any of the witnesses examined by the plaintiff; that, considering his habits, and the wretched condition in which he was when seen in December, 1856, that he should never have gone back to his boarding house for his clothing and his money, and that his relatives, from that time to this, have never learned any thing respecting him. The evidence of the witnesses produced by the plaintiff was of a character, considered by itself, to create a reasonable probability that Stephens was dead in the early part of 1857, and the value of the positive evidence, that he was seen afterward, was materially weakened by the fact that two of the witnesses were

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mistaken, either upon this or upon the former trial, as to the precise year when they last saw him. Under such circumstances, every thing, however slight, which tended to strengthen the circumstantial evidence, should have been received; and of this character, I think, was the evidence offered and excluded as to Stephens' habits, such as to his lying about the streets night and day, when he was intoxicated, and the general inquiry, what were his habits, as regards dissipation; his habits in respect to visiting his relatives; whether he had ever been absent for a period longer than two weeks, prior to 1856; whether he had ever traveled any distance from the city, &c., &c. The facts that he was not a man of migratory habits; that he had continuously dwelt in this city, gaining his livelihood in the public markets; that he was, up to the time of his disappearance, a man of grossly intemperate habits, lying about the streets by night and by day when intoxicated, were circumstances tending to strengthen the probability that his fate was that of many unfortunate beings like him, who have perished in the streets from intemperance and exposure in the middle of winter, and who are interred, without the knowledge of friends or relatives, in the common receptacle for the outcast or unknown. That this should have occurred in respect to Stephens, without the knowledge of any one who knew him, was not, as I have already suggested, improbable. It is not many years ago that an old and well-known citizen was found dead in our streets. His body was taken to the reception house, and, not being identified, he was buried by the public authorities in the ground appropriated to paupers, and more than half a year went by before his wealthy and influential relatives ascertained, after the most active inquiries, the manner of his death and burial.

Though the law presumes that one who is missing is living, until seven years have elapsed, yet circumstances may be shown from which a jury will be warranted in assuming that he was dead at a time within that period (1 Greenleaf on Ev. § 41; *Merritt v. Thompson*, 1 Hilt. 551; *Houstman v. Thornton*, 1 Holt N. P. C. 242; *Watson v. King*, 1 Starkie, 121; *Green v. Brown*, 2 Str. 1199). In the present case, the defendant

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seeks to avoid a liability deliberately entered into, upon the ground that she was at the time a married woman. When this case was last before us, it appeared that the defendant was married to Brady when Stephens was living, in September, 1856; that after the marriage she went by the name of Brady, until she heard that Stephens was alive, when she resumed her former name, but apparently continued her relation with Brady, who spoke of her to one of the plaintiffs as his wife, when she became surety for Brady, at the time when the plaintiffs leased to him their house in Broadway, in the management of which she, to some extent, participated, and that when asked, upon that trial, if she told Mr. Stouvenel, the plaintiff, that she was married, she testified that he looked at her signature, M. A. Stephens, and asked her if that was her name, and that she answered that it was. It appeared also upon that trial that she was the owner of a house in the Eighth avenue, in this city, and that Brady was then dead. The question, therefore, whether Stephens was living or not on the 7th of January, 1858, if determined against her, would result simply in making her liable upon a contract entered into under such circumstances, and whether facts sufficient to support a finding that he was dead at that time can be shown, is to be determined when all the circumstantial evidence which the plaintiffs are entitled to offer has been given. As evidence was excluded which should have been received, there should be a new trial, and as the case has already been tried before two different referees, one of whom admitted evidence that was not competent, and the other of whom rejected evidence which should have been received—one of them finding that Stephens was dead at the period in question, and the other that he was living—the case should now be tried by the court and a jury, as the conclusion of twelve men would be more satisfactory in determining this mooted question of fact than would be a finding by a referee. The report of the referee should therefore be set aside, and a trial by jury ordered.

New trial ordered.

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JOHN. J. DONALDSON v. LAURISTON HALL.

An act, admission or representation will not operate as an estoppel *in pais*, unless it is made with the design to influence the conduct of the party who acts upon it.

The mere rendition, by a surviving partner, of a copy of the firm's books showing a credit to A. for the amount of which the firm had given to A. a non-negotiable due-bill, does not estop such surviving partner from denying the debt, in an action against him upon the due-bill, by an assignee of A.; it not appearing that such rendition was made with any intent to induce others to purchase the claim.

Otherwise, *it seems*, if the plaintiff, before purchasing the due-bill, had sought for information from the defendant, and the latter had given him a copy of the account, showing the credit.

A gift from a husband to his wife,—*Held*, sufficiently proved.

APPEAL from a judgment entered on a verdict at special term.

This action was brought by the plaintiff as assignee of the following instrument:

“\$2,400.

NEW YORK, May 1st, 1859.

Due Mary L. Hall twenty-four hundred dollars, with interest on fourteen hundred dollars from October 21st, 1858, and with interest on one thousand dollars from January 29th, 1859, being proceeds of Francis Gilman's mortgage note, and of three Mad River and Lake Erie R. Road bonds.

J. MORTIMER HALL & Co.”

The firm of Mortimer Hall & Co. was composed of J. Mortimer Hall, deceased, and his brother, the defendant, who is now sued as the surviving partner. On the trial, it was admitted that the note in suit was in the handwriting of the deceased partner. The defendant, in the month of January, 1862, sent to Mary L. Hall, the widow and executrix of his deceased partner, a transcript of the balances of the firm-books, in which she was credited with \$2,777.12. The plaintiff testified that

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he had seen the transcript before purchasing the note in suit. Mrs. Hall testified that the mortgage note and bonds, mentioned in the due-bill, had been given to her by her husband, in the years 1856 and 1857; that she gave the mortgage note to the defendant in 1858, for collection, as he was going West, and that she gave the railroad bonds to her husband in 1859, and never received the proceeds of either or any of them, except in the note in suit. The defendant testified that the mortgage note and bonds belonged to his deceased partner, who had delivered the former to him to use in paying the debts of the firm, and it was so used, and that the bonds were used for the same purpose by his partner. The deceased partner made the entry of the indebtedness of the firm to Mrs. Hall, against his objection, and he offered to show that his brother had agreed to change the credit to his capital stock account, and that he saw the note in suit for the first time after his partner's death. The defendant offered to show that the deceased partner was still indebted largely to the firm. Excluded by the court.

The testimony having been closed, the court held that there was no question to go to the jury, and directed them to find for the plaintiff. From the judgment entered upon the verdict, the defendant appealed to the general term.

Wakeman & Latting and *John C. Dimmick*, for appellant.

John Graham and *George Owen*, for respondent.

BY THE COURT.—DALY, F. J.—The account or balance sheet which the defendant sent to Mrs. Hall, or to her co-executor, and which the plaintiff saw before he purchased the due-bill, was merely presumptive evidence that the firm was indebted to Mrs. Hall in the amount of the due-bill. It was simply a transcript of the balances, as they appeared upon the books of the firm, at the time when the account was made out by the defendant. This account was not conclusive as between the defendant and Mrs. Hall (*Nichols v. Alsop*, 6 Conn. R. 477), and it would not operate as an estoppel between the defendant and the plaintiff, as there is nothing in the case to show that it was made out and

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sent with the design of inducing the plaintiff to purchase the due-bill. It probably enabled Mrs. Hall to sell the claim to the plaintiff. It may have been the moving cause which induced him to purchase it; but that is not sufficient to constitute an estoppel. An act, admission or representation will not operate as an estoppel *in pais*, unless it is made with the design to influence the conduct of the party who acts upon it (*Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Dezel v. Odell*, 3 Hill, 215; *Mechanics' Bank v. New York and New Haven Railroad Co.* 13 N. Y. 638; *Pickard v. Sears*, 6 Adolph. & E. 469; *Gregg v. Wells*, 10 Id. 90; *Tufts v. Hayes*, 5 New Hamp. R. 453). The acceptor of a bill of exchange is estopped from denying the genuineness of the signature of the drawer, as the indorser of a promissory note is estopped from disputing the genuineness of the preceding signatures; but this is an exception to the general rule, in favor of instruments of this negotiable character (*Drayton v. Dale*, 2 Barn. & Cress. 293; *Taylor v. Croker*, 4 Esp. R. 187; *Bass v. Clive*, 4 M. & Selw. 13). Such instruments pass by their mere indorsement, and it would impede their circulation, and impair the security of commercial transactions, if the parties who have given them credit and currency by accepting or indorsing them, should be afterward permitted to dispute their genuineness. But the sending by a surviving partner to the executor of his deceased partner of an account of the assets and of the indebtedness of the firm, from which it appeared that the firm was indebted to one of the executors in a certain sum, could not be regarded as having been made with the design of inducing others to purchase the claim. It was merely a statement of the affairs of the firm of which the executor had a right to be advised, and which it was the duty of the defendant to furnish, and, as between him and the executor, it would be presumptive evidence, but it would not be conclusive. If the plaintiff, before purchasing the due-bill, had sought for information from the defendant respecting it, and the defendant had sent him a transcript of the account of Mrs. Hall, as it appeared upon the books of the firm, the case would have been very different. When the plaintiff took an assignment of the due-bill, he took it subject to the equities existing between the original

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parties. It was not payable to order, and was not designed to be transferable by indorsement, and as the defendant made no representation to the plaintiff respecting it, or in respect to the state of Mrs. Hall's account with the firm, he was no more estopped from disputing it in a suit by the assignee, than he would have been if Mrs. Hall herself had sued upon it.

If the mortgage note and the railroad bonds were given to Mrs. Hall by her husband, in the manner described by her, I think it would, within the cases, have been a valid gift, and that the property would have become hers (*Lucas v. Lucas*, 1 Atk. 270; *McLean v. Longlands*, 5 Ves. 71; *Slanning v. Style*, 3 P. Wm. 337; *Lawson v. Lawson*, Id. 442; *Walter v. Hodge*, 2 Swanst. 97). As these securities were afterward collected by the firm, and used for the payment of its debts, and as the due-bill purports upon its face to have been given to Mrs. Hall for the proceeds which the firm had thus collected and used, these facts would suffice to show that the due-bill was a valid obligation in the hands of Mrs. Hall, or in those of her assignee, and that the defendant, as the surviving partner of the firm, was bound to pay it. But the difficulty in the case is, that the judge held that there was nothing for the jury to pass upon, and instructed them to find a verdict for the plaintiff; whereas there was a conflict between the testimony of Mrs. Hall and that of the defendant upon a point which cannot be regarded as immaterial, and which the jury alone could pass upon. Apart from the existence of the due-bill, and of the credit to Mrs. Hall on the books of the firm, the only evidence of the gift of the securities to her by her husband was her own testimony, and, in the account of the general transaction, she testified that she gave the mortgage note to the defendant between the 1st of January and the 21st of May, 1858, to collect, having up to that time retained it in her possession; while the defendant testified that it was given to him by his brother, with instructions to collect it, and to apply the proceeds to the payment of a debt of the firm, which he did. It was for the jury to say which of these two statements they would believe, and if they believed that of the defendant, it was for them to determine whether they would regard this as affecting her general credibil

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ity or not. The existence of the due-bill, and the fact of the entry to her credit of the sum of \$2,596 upon the books of the firm upon January 1, 1861, which was the amount of the proceeds of these securities, with interest up to that date, are circumstances which show very satisfactorily to my mind that these securities were actually given to her by her husband, and had become her property when they were collected and applied to the use of the firm; but I do not see how the case could be taken from the jury. It is a matter of regret to be compelled to grant a new trial, but I cannot see how it can be avoided.

New trial ordered.

CUMBERLAND G. WHITE *v.* JOHN L. BROWNELL, PRESIDENT, &C.,
and others.

As the privilege of membership of a voluntary unincorporated association is not conferred by the sovereign power, but is created solely by the organization itself, courts of law cannot compel the admission of an applicant for membership, nor interfere to restore to membership one who has been expelled for non-compliance with the conditions upon which membership is made to depend.

The members of such an association are bound by its rules, when not in conflict with the law of the land; and the courts can interfere no further than to hold the association to a fair and honest administration of those rules. Therefore, to warrant the granting of an injunction to restrain the officers of a voluntary unincorporated association from carrying into effect a resolution or vote suspending a member from the privileges of the association, it must appear that the suspension was in violation of the constitution, rules, or by-laws; for, unless they were violated by the proceedings against him, he could have no ground of complaint.

The "Open Board of Brokers," in the city of New York, is not a copartnership within the operation of the equitable remedies afforded by the courts for the protection of the rights of partners, as between themselves.

Nor is that board a corporation in such sense as to render it subject to the rules by which courts of equity interfere to restore a corporator, who has been unlawfully expelled or disfranchised, to his privileges of membership.

APPEAL by the plaintiff from an order granting a motion to vacate an injunction.

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The action was brought against the defendants, Brownell, president of the "Open Board of Brokers," and others, to obtain an injunction restraining them from interfering with the plaintiff's privileges as a member of that board.

The Open Board of Brokers was organized in the year 1864, by S. L. Joseph, Samuel B. Hard, and seventy-five other persons, their associates. The associates adopted a constitution and by-laws, and made provision therein for a room for the use of the board, for the election of a president and other officers, for the formation of an executive committee, a committee of membership, a committee of arbitration and a board of appeals. It also provided for the election of new members. Elections to membership were to be made by ballot, and after the report of the committee on membership, whose duty it was to make diligent inquiry as to the qualifications of the applicant; the new member, upon signing the constitution and paying an initiation fee, was entitled to all the rights and privileges of a member. No person is declared to be eligible to membership unless he procures a Government license as a broker. The constitution also contains clauses for the suspension and expulsion of members, and their readmission. It also provides that every member pledges himself to abide by the constitution, by-laws, and rules of the association. Under the provisions of the constitution, several hundred new members have been admitted to the board, with all the rights and privileges of the original subscribers.

It is declared to be the duty of the arbitration committee to take cognizance of and exercise jurisdiction on all claims and all matters of difference between members of the board, and its decision is declared to be binding. It is provided, however, that an appeal from the judgment of the arbitration committee may be taken to the board of appeals, which board shall take cognizance of all cases of appeal from the judgment of the arbitration committee.

It is also provided in the by-laws, that, "as a means of mutual protection," it shall be the duty of any member to report to the board all cases of defalcation of contracts of other members, and all cases of refusal or inability to pay differences,

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whereupon the president shall declare the member so reported suspended. From such suspension the reported member may appeal, and demand a hearing before the executive committee.

In the year 1865, the plaintiff, who was a stock broker, doing business in New York, was elected a member of the board. He paid his fee on initiation, and subscribed the constitution, and became entitled to all the privileges, and was subject to all the obligations of membership under the constitution and by-laws.

In May, 1867, the by-laws were so amended as to provide that whenever a member be in default in any contract, and the fact should become known to the committee on membership, the committee, after due investigation, should report the same without delay, through their chairman, to the president of the board, who should at once declare the member so reported suspended from all the privileges and immunities of the organization; that from such suspension the reported member might appeal within sixty days from the date of such suspension, and demand a hearing before the executive committee, who should give public notice at the board at least five days before such appeal, for the purpose of enabling any person interested to present objections, and that they should report the result of their investigation.

If it should appear that the complaint is just, the declaration of suspension should be confirmed, otherwise it should be annulled.

It appears that the association are the lessees, and are in the occupation of a building known as number 18 Broad street, where the business of the association is transacted, and are the owners of a considerable amount of Government bonds and other assets, the accumulation of initiation fees of members and fines imposed. The sittings of the associates are held in the building on Broad street, at stated hours of the day, in a large room, which partakes of the character of an exchange or mart where gold, stocks, and other securities are bought and sold by the members dealing with each other, and that the right to enter such room, and to take part in the sessions of the board, and to have free access to the same, and to transact

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business thereat, in the purchase and sale of stocks and other securities, as a broker and as an associate, forms the principal right and privilege of a member of the board.

In the month of January, 1867, the plaintiff entered into a contract with Currie, Martin & Co., stock brokers and associates with plaintiff as members of the board, by which Currie, Martin & Co. purchased of the plaintiff one thousand shares of the capital stock of the Hudson River Railroad Company, at 128 per cent., payable and deliverable at seller's option, this year, 1867, with interest at the rate of six per cent. per annum, either party having the right to call from time to time for deposits to meet the fluctuations of the market. Deposits were made by both parties to the contract in the United States Trust Company, from time to time, under the contract, to the amount of \$55,000 each.

The Hudson River Railroad Company having adopted a resolution in April, 1867, increasing the capital stock of the company, permitted stockholders to subscribe for such new stock within a certain time, and upon certain conditions. On the 10th April, Currie, Martin & Co. notified plaintiff that they elected to subscribe for the additional stock in the company, and that they looked to plaintiff for same. The plaintiff avers that he had no right to subscribe for the new stock; that he was not a stockholder, and that he would not have subscribed for such additional stock were he a stockholder, as he did not consider the stock to be a good and profitable investment.

On the 5th September, 1867, Currie, Martin & Co. called on the plaintiff to deposit \$10,000 further margin to secure the contract, which plaintiff refused to furnish, whereupon they notified plaintiff that they would, under the rules of the board, purchase at the board 2,000 shares of the stock of the company, whereupon the plaintiff served on the president of the board a protest against the purchase of any shares of stock in the Hudson River Railroad Company upon his account, under his contract with Currie, Martin & Co. The president of the board did, under the rules, purchase the 2,000 shares of stock on plaintiff's account, which was paid for by Currie, Martin &

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Co., notice of which was given to plaintiff by Currie, Martin & Co. on the same day; the notice was at once returned by plaintiff, with a notice to Currie, Martin & Co. that he repudiated the transaction.

Currie, Martin & Co. then made a *claim* on the plaintiff for a large sum of money as difference in their favor, and demanded payment thereof, which was refused by plaintiff.

On the 6th day of September, 1867, Currie, Martin & Co. presented their claim and difference to the arbitration committee, and demanded an examination, inquiry and decision upon the same. This committee appointed a meeting for such purpose, for the 9th day of September. The plaintiff was notified to appear on that day before the committee, and interpose whatever defense or objection he might have to the claim and demand of Currie, Martin & Co. On the day the committee met, the claimants appeared before it, and presented their claim, and gave evidence of the facts upon which it was based. The plaintiff did not appear before the committee. He declined, and refused to be present or submit the matter to them, and served upon the chairman of the committee a notice in writing of such refusal.

The committee made their report, finding, in substance, that Currie, Martin & Co. were entitled, under the contract of February 18th, 1867, to one thousand shares of the increased capital stock of the Hudson River Railroad Company, they having given notice to plaintiff that they elected to subscribe for the same; that default having been made by plaintiff in responding to the call for additional deposit, it was at the option of the claimants, under the rules of the board, to elect whether to cancel, to close, or to continue the contract, and that Currie, Martin & Co. did elect to close same. Judgment was rendered in favor of the claimant against plaintiff, in the sum of sixty-nine thousand six hundred and thirty-three dollars and thirty-four cents, with interest.

Plaintiff did not appeal to the board of appeals from the decision of the arbitration committee. After the expiration of the time to appeal, Currie, Martin & Co. caused the facts and circumstances to be brought to the notice of the committee on

membership. A meeting of this committee was held on the 10th of September; the claim and difference was investigated by this committee, and the committee reported to the president of the board that the plaintiff was in default in his contract with Currie, Martin & Co.

On the 19th September, the president of the board declared the plaintiff suspended from all the privileges of the said organization.

The plaintiff took an appeal to the executive committee of the board, from such declaration of suspension, in pursuance of the provisions of the constitution. The president of the board took measures to have said committee called together to consider said appeal, and a meeting of the committee was held on the 25th September, in pursuance of the notice required, at which a quorum was not present, and before another meeting was held this suit was commenced in this court.

After the service of the complaint in this suit, a meeting of the executive committee was held to consider the appeal, of which plaintiff had notice. Plaintiff appeared before the committee, refused to prosecute his appeal, and protested against and forbid the committee from taking any proceeding or action in the appeal, and the committee took no further action.

The plaintiff charged in his complaint that several members of the arbitration committee were prejudiced against him and his claim, and had, before acting, expressed an opinion favorable to Currie, Martin & Co.'s view of the matter; that there was unnecessary delay in assembling a meeting of the executive committee; that the delay was occasioned by a disposition on the part of Currie, Martin & Co., and other members of the association, to deny the plaintiff justice; that the association, through its officers, committees, and members sufficient to control its action, has denied the plaintiff justice. The plaintiff denied all the claims made by Currie, Martin & Co., and claimed that his original contract with them was still in force. He claimed that his suspension was unjust, and would inflict irreparable injury on him in his vocation, as broker, by his exclusion from the rooms of the board, and exclusion from his rights and immunities as a member.

Plaintiff demanded judgment that the board and its officers and servants might be enjoined and restrained from in any manner interfering with him in the full and free exercise and enjoyment of all his rights and franchises as a member of the organization, or with his enjoyment, in common with other members of the association, of the right to enter the rooms, and remain at all the sessions of the board, and to transact business thereat in the buying and selling of gold, stocks, and other securities, as other members do, or from treating him otherwise than as an actual and unsuspended member.

The president of the board, in his answer to the complaint, denied that either himself or any other officer or member of the board, so far as he had any knowledge or information, had at any time taken any side, or combined, or in any manner acted with or at the instigation of the said firm of Currie, Martin & Co., against or to the prejudice of the plaintiff, or had in any way or manner desired or sought to deny the plaintiff justice, or to interfere in any way or manner, except so far as the constitution and by-laws of the board required them to interfere in the controversy between plaintiff and Currie, Martin & Co.

An injunction was obtained by plaintiff on his complaint. The defendant, the president of the Open Board of Brokers, moved at special term for a dissolution of the injunction on the complaint and answer. The motion was granted, and the injunction dissolved, with the following opinion by

VAN VORST, J.—The Open Board of Brokers is not a corporation; the obligations and rights of its members are not determined or fixed by any statutory enactment general or special. It is not a joint stock association. There has been no contribution of capital by its members for the prosecution of business of any kind by the association. There has been no stock issued to its members, nor can the individual members claim any rights of property in it as stockholders.

The association is engaged in no business and does not devote its funds to the prosecution of any undertaking to produce profit or gain to its members; nor is it a copartnership; in its

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organization, the essential features which characterize a partnership are wholly wanting. There are no profits earned to be divided among the members, nor are there losses to be borne.

The constitution, the contract between the parties, does not establish copartnership relations between the members; the associates do not hold themselves out to the world as copartners, nor is there any thing to show that they regard themselves, the one to the other, in that relation.

The association looks to a continued existence, unaffected by the death, resignation, suspension, or removal of its members. If it was a simple copartnership, the death or retirement of an associate would dissolve it.

It is an established principle in the law of partnership, that if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership, and the civil law contains the same rule (Kent's Com. vol. 3, p. 53).

The death of either party is, *ipso facto*, from the time of the death a dissolution of the partnership, however numerous the association may be.

But in this organization, although individual members retire, die, or are expelled, the body lives.

The status, rights, and obligations of this plaintiff are not, therefore, to be determined by a consideration of this association in the light of its existence either as a corporation, joint stock association, or copartnership.

The Open Board of Brokers is a *voluntary association* of persons, who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business, agreeing among themselves to pay the expenses incident to the support of a "*Mart*," in which each for himself, at stated hours of the day, and for his individual profit, may prosecute his own business and enter into separate engagements with his fellow members. The association does not share in the losses of the individual associates, each member takes his own gains, and individually sustains the losses incident to his engagements. The organization of this board grew out of a necessity for "new

and greater facilities for exchange and negotiation incident to the rapidly developing interests of the country and the increasing number and value of its commercial securities." As the number of these securities had been largely augmented, so, too, the body of persons who dealt in them as purchasers and sellers for others had greatly increased, and new organizations were required to be formed, and new places of business appointed to meet the wants of a growing and increasing business. The persons who formed this association were brokers. It is stated in the constitution that no person was eligible to membership unless he possessed a Government license as a broker. A broker is an agent simply. He transacts business not for himself, but for another. He is a middle man, a negotiator between other persons for a compensation.

A stock broker deals in stocks of moneyed corporations and other securities for his principal. It is a calling of great responsibilities, in which punctuality, honesty, and knowledge are required.

Acting as the stock broker does for others, it is important that all the engagements he enters into should be promptly and faithfully fulfilled, both by himself and the party for whom he contracts. Hence, the language of the agreement of the original associates is suggestive, "such business can only be transacted where there is the utmost confidence, and such confidence is begotten only by public, open, fair, and upright transactions where every party interested may and can know where and how such business is done," and hence, "a great public mart," open to all the associates, was desirable.

It follows, from the very nature of such an organization, with such objects, intents and purposes, that there must be rules and regulations for the good order of the Association, and which rules should be held to be conclusive as to the mode of transacting business between the members, and as to the privilege of admission to, and continued enjoyment of, membership.

As this association is not organized in pursuance of any statute, nor the terms of membership fixed by the principle of the common law, it follows that the agreement which the members make among themselves on the subject, must establish and

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determine the rights of the parties on the subject. The constitution of the association, and its laws agreed upon by the members, contains all the stipulations of the parties, and is the law which should govern. The members have established a law for themselves. No person is entitled to membership, in the Open Board of Brokers, except he is approved by the appropriate committee, voted for by the board, and shall agree to, adopt, and affix his name to the constitution, and, having done this, each member should stand by his contract. Each member is under an obligation to support it himself in all its details, and is under a duty to see to it that it is supported by others. "As a *means of mutual protection*, it is declared to be the duty of every member to report to the board all cases of defalcation of contract of other members, and all cases of refusal or inability to pay differences" (Article 8, of By-Laws).

The very existence of this body depends upon the faithful observance of its organic law by all its members.

The court must regard the constitution and laws of this board as the contract by which all the members are bound. The court cannot make any other contract for the parties than they have solemnly made for themselves. It is not the province of courts of law to make contracts for parties. It may explain, interpret, enforce, and, in some instances, where contracts are hard and unconscionable, relieve from them.

But there is no claim in this suit that the terms of this constitution, adopted by the plaintiff, are hard and unconscionable. The plaintiff does not ask to be relieved from his membership, he rather demands that he may be allowed to remain in the association, under the constitution; he does not wish to be suspended, or have his connection determined and ended. In an organization of the character of the Open Board of Brokers, with its several hundred members, the business transacted at its room being daily large in amount, and the stocks and securities dealt in being ever fluctuating in value, it was not unreasonable to apprehend that there would be constantly occurring differences between members, acting as agents for others, in regard to the terms of contracts, and as to the obligations and duties of contracting parties under agreements often hastily made.

The temptation to avoid a contract in a rapidly rising or falling market, as the pecuniary interest of a party might prompt, rendered it imperative that some tribunal in the body of the association, should be appointed and agreed upon, to take cognizance of and exercise jurisdiction over all claims and matters of difference which might arise between members of the board. This appears the more important, as confidence in each other, and in the engagements which they might make, one with the other, and in the fairness, openness, and uprightness of their transactions, and in the certainty that their engagements would be fulfilled, are announced as the causes which led to the organization. To be effective, their decisions should be prompt. As these engagements would be constantly maturing, it was eminently proper that a tribunal should be near to render speedy and exact justice. Confidence is the real life of such engagements; hence, the appointment of a committee of arbitration is a prominent feature in the constitution of this board, and, by the express assent of each member, jurisdiction is awarded to this committee in advance of all claims and matters of difference which might arise between the members. The associates have agreed, among themselves, that the decisions of this committee shall have conclusive force, and that the members shall be bound by them; and each member is truly bound by such decisions so far as they are made the basis of subsequent action in the board to secure its good government and its constitution.

Let us apply the above principles to the claim before us. A claim and matter of difference arose between the plaintiff, a member of the board, and Currie, Martin & Co., also members, growing out of their respective rights and obligations, under a contract for the purchase of 1,000 shares of Hudson River Railroad stock, agreed to be sold and delivered by plaintiff to them. This contract was made at the board, and between its members. It was in respect to a transaction embraced directly within the objects and purposes for which the association was formed. Currie, Martin & Co. claimed the right, under the contract, to subscribe for the increased stock proposed by the railroad company to be issued, and they elected to do so, and looked to plaintiff for the same. This claim to subscribe for

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the additional stock was not admitted by plaintiff. Currie, Martin & Co. claimed of plaintiff a deposit of additional margin under the contract, which was refused; they then notified plaintiff that they should, under the rules of the board, purchase 2,000 shares of said stock on plaintiff's account, against which proposed action plaintiff protested. The stock was bought by the president of the board under the rules, of which plaintiff was notified. He refused to recognize the transaction, or pay for the stock, and Currie, Martin & Co. paid for it, and made a claim and demand on plaintiff for a large sum of money, the difference in their favor. The justice of the claim was denied, and its payment refused by plaintiff.

This was a claim and matter of difference over which the arbitration committee had jurisdiction so soon as the case should be brought before it. It was presented to the committee by the claimants, and an examination and adjudication upon it demanded. A day for hearing was appointed, and plaintiff summoned to appear and answer, and interpose his defense. The plaintiff declined to appear before the committee, claiming that there was nothing to be submitted, and that there was no difference between him and Currie, Martin & Co.

Now, the facts clearly show that there was a real and substantial difference between these parties; claims were presented on the one side to a large amount, growing out of the contract, and denied on the other. If the parties had agreed in regard to their respective rights, then there would have been no claim or difference, but they were very far apart. The question is not whether the claim of Currie, Martin & Co. was right or wrong in itself, just or unjust. There was a difference, which was to be adjusted, and of which the plaintiff, when he became a member, had agreed that the committee should take cognizance. The plaintiff seems to rest in the belief that because he denied that Currie, Martin & Co. had a claim, that therefore there was none in their favor; he would decide the matter for himself. Now it happens that much of the real business of courts of law arises from the assertion of a claim by the plaintiff and its entire denial by the defendant, yet the action proceeds to trial and final determination, and it is no uncommon

occurrence that the party who denies the claim fails in his defense.

A claim "is a demand of a right or a *supposed right*, a calling on another for something due, or *supposed to be due* (Webster's Dic.)

And wherever there is a disagreement in opinion in regard to a contract, or a matter in controversy exists between the parties to it, there is a "*difference*" such as the committee might properly adjudicate, and of which it was bound to take cognizance.

The committee, in the absence of the plaintiff, heard and determined the matter upon the statements of the claimants, and rendered judgment in their favor. Plaintiff had a right to appear and make his objections, and set up his defense; this he refused to do. After the award was made, he could perform it and retain his rights as a member; this he declined to do. He might appeal to the Board of Appeals, and this he refused to do. Having made up his mind that Currie, Martin & Co. had no claim, he concluded that he need interpose no defense, nor take any steps to reverse the decision, and could treat the award as a nullity. The plaintiff cannot assume this position and still claim the rights of membership. He cannot invoke the aid of this court to protect him in all the rights and advantages of the association, and which he alleges are a great source of benefit to him, and still be allowed to disregard his duties under the constitution and laws of the board.

The plaintiff agreed, when he became a member, that the arbitration committee should take notice of all claims and differences between members, and that he would be bound by their decision. He refused either to acknowledge its conclusive force, in a case in which he was interested, or to appeal from its decision. The constitution must be taken as a whole. The contracting part is an entirety. All its obligations are to be assumed and discharged; all its benefits are to be enjoyed. The enjoyment of the latter depends upon the performance of the former. Were it otherwise, the association would be of no real advantage to its members. It clearly appears that good faith in the observance of the constitutional obligations of the mem-

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bers was intended to furnish a test for the right of continued membership.

There was some discussion on the argument of this motion as to the right of the plaintiff to revoke his consent to the jurisdiction of the arbitration committee over the claim and difference in question. In an action in a court of law to enforce the award, such question might be raised; for the purposes of this action, under the facts of the case, it can give him no relief. If the plaintiff would revoke the part of his agreement with his associates which imposes duties and obligations upon him, he cannot insist, in a court of equity, that he shall be protected in the enjoyment of rights and privileges created by the same contract. He that would have equity must do equity.

After the action had before the arbitration committee, no appeal having been taken, proper steps were taken to bring the facts and circumstances involved in this controversy between plaintiff and Currie, Martin & Co., and the default of plaintiff, before the committee on membership. The matter was investigated, and this committee reported to the president of the board that plaintiff was in default under the contract. The president of the board, as was his duty, declared the plaintiff suspended.

This suspension operates as a deprivation, during its continuance, of all plaintiff's privileges as a member, including an exclusion from the rooms of the board; but this declaration of suspension is not final. There is reserved to the plaintiff a right of appeal to the executive committee. The jurisdiction of this committee is ample to render and do complete justice. It has full power to hear and *investigate* the matter, and to report the result to the board itself; if it shall appear that the suspension is just, it shall be confirmed; otherwise it shall be annulled. The plaintiff has taken such appeal to the executive committee. He has placed his case in a way to be investigated, and finally decided by the board itself. Having gone thus far he pauses, he fails to prosecute his appeal; in fact has forbidden the appropriate tribunal to take cognizance of his appeal.

At this step, and with his appeal pending, he asks this court in effect to annul all that has been done by the associa-

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tion in the investigation and disposition of this matter by the officers and committees of the board. He asks this court to restore him to and protect him in the enjoyment of all his privileges and rights as a member, to give him regular standing in the organization, although its records show him to be in default, and the decree of his suspension to be unrevoked.

There are allegations in the complaint which claim that some of the members of the committee had prejudged the plaintiff's case; but in the protest which plaintiff served upon the committee, he does not place his refusal to submit or appear on any such ground. He makes no objection to the competency or fairness of the committee. He expressly assigns for his refusal, that no matters of difference have arisen between him and Currie, Martin & Co., and that they have no claim. If any such objections as he now mentions existed, he should have asserted them at the proper time, that appropriate action could be taken by the association of which he was a member.

The plaintiff also charges the officers, committees, and a portion of its members sufficient to control its action, with a disposition to deny him justice, and deprive him of his rights; but all the allegations on the subject are denied by the answer of the President.

This court, under its equitable powers, can give the plaintiff no relief under the facts disclosed. Plaintiff has unexhausted remedies for all his complaints and grievances under the constitution and laws of the board. There is no occasion for the intervention of this court. When he became a member he submitted to its laws, which afford full and complete relief. The equity of the complaint is denied.

Motion to dissolve injunction granted.

From the order dissolving the injunction, the plaintiff appealed to the general term.

William C. Barrett, for appellant.

I. The open board of stock brokers is a voluntary association subject to equitable jurisdiction, and to be treated in a court of equity by those rules which govern in the cases of

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partnerships. Even if it be treated strictly as a voluntary association and not in any respect as a partnership, the plaintiff is still entitled to the redress which he seeks.

II. The suspension of the plaintiff was wholly illegal, and was not even regular under the constitution and by-laws of the board itself.

The case of *Austin* against *Searing* (16 N. Y. 112), is only distinguishable from the present, in that the question there was one of forfeiture, not of membership, but of property, in a voluntary association. The forfeiture of membership must be more serious in its practical effect than the forfeiture of property; but were it otherwise, and were the case of *Austin v. Searing* not to be treated as an absolute guide for an adjudication of the case at bar, still it is exceedingly valuable for the purpose of ascertaining the spirit of the court of last resort in dealing with these voluntary associations.

In *Lloyd v. Loaring* (6 Ves. 773), Lord Eldon alludes, with considerable sharpness, to the great affectation of corporate power and character exhibited by the constitution and by-laws of the voluntary association then under consideration.

See also upon the question of submission to arbitration: *Haggart v. Morgan* (5 N. Y. 422); *Mitchell v. Harris* (2 Ves. Jur. 129 Summer's Ed. and Note; 8 T. R. 139); 2 Stor. Eq. Jur. Secs. 1457, 1458; *Simons v. Monier* (29 Barb. 419); *Smith v. Compton* (20 Barb. 262).

In the case of *Wells v. Gates* (18 Barb. 554), the court holds: "That in this State personal responsibility on the part of individuals constituting an association of any sort, to the full extent of the indebtedness of the association to third parties, can only be avoided by their becoming a corporation or a *quasi* corporation, and that companies or societies which are not sanctioned expressly by the legislature pursuant to some general or special law, are nothing more than ordinary partnerships, and the laws respecting them are the same."

Now, this association of stock brokers is formed under no law, general or special, and is simply formed by the signature of the members to what may be called the articles of copartnership, viz.—the constitution and by-laws.

This case of *Wells v. Gates* was followed in the case of *Dennis v. Kennedy* (19 Barb. 517), and a similar rule has been laid down, even in the case of joint stock associations; see *Allen v. Sewall* (2 Wend. 327); *Moss v. Oakley* (2 Hill, 265); *Bailey v. Bancker* (3 Hill, 188); *Harger v. McCullough* (2 Denio, 119); *Corning v. McCullough* (1 N. Y. 47).

In the case of *The St. James' Club* (13 Eng. Law and Eq. 592), a question arose before the Lord Chancellor, Lord St. Leonards, in respect to the rights of members in an ordinary club. Lord St. Leonards said that if the club was dissolved, the members would have a right to a share of the assets. He would lose the convenience of the club, but he would get a share of the assets; otherwise he would only have a right of admission to the enjoyment of the club.

In the case at bar the objects of the association are not pleasure or convenience, and there is therefore a still stronger reason for the claim, that the member is a joint tenant in and vested, in common with the other members, with all the assets, franchises, and privileges of the association. That he is clearly liable for the debts will scarcely be disputed. Mr. White, for instance, while to-day prevented by his fellow members from enjoying his rights as a member, is clearly liable to an action by the creditors of the association; and it is not perfectly clear that if, in any such action, he should plead his suspension by the act of his associates as a defense, it would be stricken out as frivolous.

So here, then, is presented the singular spectacle of a man fully vested, in common with all the other members with all the assets of the association, and liable for its debts, yet denied access to its apartments, and prevented from enjoying any of the privileges for which he has assumed those liabilities, for which he has paid his money, and which are the concomitants of his vested interest in the assets.

A distinction was made in England, in the case of ordinary clubs conducted upon ready money principles, to the effect that a tradesman supplying goods to such a club, does so upon the credit of the funds, and that, *at law*, the members of such a club are not individually liable for debts incurred by its com-

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mittee (*Caldicott v. Griffiths*, 22 Eng. Law and Eq. 527; and cases there cited in the briefs of counsel). This distinction, however, is only applicable to proceedings at law as between the creditors of the association and the members. They have, however, invariably been treated and dealt with in the courts of equity as partnerships (Collyer on Part. sec. 53; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Greenwood's case*, 23 Eng. Law and Eq. 422; *Richardson v. Hastings*, 29 Eng. Chan. 323). And the courts of equity have invariably examined and considered the reasons for the expulsion of members, and, if injustice has been done, they have been prompt in correcting abuses and affording adequate redress; and that, too, in cases where the equities were infinitesimal, compared with the present (*Innes v. Wylie*, 1 Carr & Kir. 257; *Ex parte Woolbridge*, 1 Ellis, B. & S. 844; *Blisset v. Daniel*, 23 Eng. Law and Eq. 105; *Regina v. Mallinson*, 1 Eng. Law and Eq. 289; *Bury v. Cross*, 3 Sand. Ch. R. 1; *The Commonwealth v. Pike Ben. Soc.* 8 Watts & S. 247).

In *Gormon v. Russell* (14 Cal. 531), it was distinctly held—citing *Lloyd v. Loaring* (6 Ves. 773); *Cockburn v. Thompson* (6 Ves. 322); *Pierce v. Piper* (17 Ves. 8); *Beaumont v. Meredith* (3 Ves. & Beam. 180), where the Chancellor said, that “The society can be considered in this court only as a partnership” (Collyer on Part. § 553; Gow on Part. 2, 227; *Babb v. Reed*, 5 Rawle, 151)—that voluntary associations for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, &c., are partnerships, and may be dissolved by a court of equity if they improperly exclude a member.

The general rule is, that corporations can exercise this jurisdiction only in cases of offenses recognized by common law as cause for expulsion. Of these there are but three: (1.) Violation of duty to the society, as a *member* of the corporation; (2.) Offenses as a citizen against the laws of the country; (3.) Breach of duty in respect alike to the corporation and the laws (2 Burr. 732).

In the case of *The People v. The Med. Society of Erie* (24 Barb. 570), affirmed in the Court of Appeals in 32 N. Y. 18, a medical society expelled a member for charging less than the

sum which had been fixed and established by them as the tariff of fees for medical services performed by its members.

It was held that the power given to them to make regulations relative to the expulsion of members, although conferred in general terms, was not an arbitrary, unlimited power; and that, notwithstanding such by-law, the society had no right to expel the member, for the reason that such by-law was unreasonable and oppressive upon the members, and interfered with their private rights. The learned judge stated, that expulsion or disfranchisement is a matter of serious import, and should not be permitted, unless the member is guilty of such offense as tends to work the destruction of the body corporate, or the destruction of the labor and privileges thereof. In the Court of Appeals, Judge Parker satirized the regulations embodied in the so-called code, and treated them as null and void. At the same time he expressed a very decided opinion against the sharp and summary judgment of such bodies (see *The Commonwealth of the St. Pat. Ben. Society*, 2 Binn. R. 511; *Green v. The African M. E. Society*, 1 S. & R. 254; *The Commonwealth v. The German Soc.* 15 Penn. State R. 251; *Fuller v. Trust. Acad. Sch. in Plainfield*, 6 Conn. 533).

Some objection was taken upon the argument to the form of the relief sought, but it is submitted that the plaintiff was clearly entitled to it upon several grounds:

First. He is entitled to it upon the ground that his copartners or cotenants seek to exclude him from taking that part in the concern which he is entitled to take (Story on Part. (3d ed.) p. 356, note; *Wilson v. Greenwood*, 1 Swanst. R. 481; Collyer on Part. B. 2, ch. 3, sec. 6, pp. 240, 241, 2d ed.).

Second. Also upon the ground that one partner may apply to a court of equity to restrain the oppression and overbearing of another partner (*Charlton v. Poulter*, 1 Ves. 429, and 19 Ves. 148; Story, Part. § 227; Collyer on Part. b. 2, ch. 3, § 5, p. 313).

Third. And the plaintiff is entitled to the relief sought, although he does not ask a dissolution of the association. In fact, he is not entitled to a dissolution, unless the court sees that redress cannot be afforded without a winding up (Gow on Part. ch. 2, sec. 4, pp. 111, 112, 3d ed.; *Charlton v. Poulter*, 19 Ves. 148).

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Fourth. The opinion that a partner's misconduct may be restrained by an injunction without the necessity of a dissolution is sanctioned by Lord Eldon (*Goodman v. Whitcomb*, 1 Jac. & Walt. 572).

Fifth. And if not a partner, he would still be entitled to an injunction on the well-known ground and principle of irreparable injury and the total destruction of business (*Carpenter v. Gwynn*, 35 Barb. 395; *Livingston v. Livingston*, 6 John Ch. 497; *Holdane v. Trustees &c.* 21 N. Y. 474; S. C. 23 Barb. 103).

It was also claimed that the plaintiff was not entitled to an injunction until the final hearing, but,

First. It is plain that there has not been an attempt to deny a single prominent fact upon which the equities rest. The case, therefore, is to be treated as upon the hearing (*Grimstone v. Carter*, 3 Paige, 421).

Second. But had the equities been denied, it is a clear case of irreparable injury; nay more, of ruin and destruction to a man's business; a case without remedy of any kind at law—no pretence that a *mandamus*, *quo warranto*, or even the useless action for damages would lie: in fact, a case of absolute and entire ruin, and that ruin between now and the hearing. An injunction was never refused under such circumstances. It has been granted with far less equity (*Livingston v. Livingston*, 6 John. Ch. 497; *Spear v. Cutler*, 2 Code R. 100; *Dubois v. Budlong*, 15 Abb. Pr. 445; *Ryckman v. Coleman*, 21 How. Pr. 404).

Third. And it is by no means of course to dissolve an injunction upon a full denial of the equity of the bill, if the court, in the exercise of a sound discretion, can see a good ground for retaining it—and if ever, in such cases, rests in the sound discretion of the court (*Bank Monroe v. Shermerhorn*, Clark, 303; *Benson v. The Mayor*, etc., 10 Barb. 223; *Vermilye v. Vermilye*, 14 How. Pr. 470).

Fourth. The rule, even in an ordinary case, without any of the extraordinary equities of this, is to continue the injunction, if upon the papers there is probable cause for the belief that the plaintiff will be ultimately decreed the relief asked, or if the rights sought to be protected are free from reasonable doubt

(*Snowden v. Noah*, Hopk. R. 347; *Bruce v. Del. & Hud. Can. Co.* 19 Barb. 371).

Fifth. The preliminary injunction cannot possibly prejudice the defendant; while without it, the plaintiff is a ruined man. This is a well settled ground for retaining a preliminary injunction, even when all the equities are denied (*Carpenter v. Danforth*, 19 Abb. Pr. 225; *Church Hol. In. v. Keech*, 5 Bosw. 691).

Another point was made below, based upon the undoubted rule that a court of equity will not aid a party in specifically enforcing a contract which he himself has violated. But White did not violate the contract. Every agreement must have a fair and reasonable construction. The agreement in question never contemplated that a member should put his head in the noose. It cannot be said that there is even a moral delinquency in refusing to submit a controversy involving all a man has to a tribunal openly, publicly, and avowedly biased, prejudiced, and which has already made up its mind.

Even if White had been guilty of a breach of his agreement, would a court of equity, for that reason, allow him to be treated as a pariah. A plaintiff is never denied full equity because of his refusal to abide by an agreement enforceable neither at law nor in equity, and which both law and equity condemn, as a direct usurpation of the functions of the courts.

The plaintiff does not come into court with unclean hands, because of a refusal which law and equity commend (*Story*, Equity Jur. §§ 670, 1457; *Austin v. Searing*, 16 N. Y. 112).

William R. Martin, for respondent.

I. The constitution and by-laws of the Open Board are a contract between its members. They provide for the suspension of a member, and the plaintiff was suspended in precise conformity therewith, and was rightly suspended.

He has signed its constitution, and pledged himself to abide by the same, and also by its by-laws, resolutions, and rules (Con. Art. 16). These instruments, therefore, become his

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contract with his fellow members, and the case before the court is primarily one of the construction of contract. In *Austin v. Searing* (16 N. Y. 121), it was held "that these constitutions were contracts, and must be subject to the same rules with all other contracts." One of the provisions of this contract is for the suspension of members; and our proposition is, that he was suspended in precise conformity with the terms of this contract, and rightly suspended; that he is liable to the consequences that follow a strict performance of that contract by his associates; and that he would not be entitled to any relief, on the ground that the contract was improvident, or that its provisions were onerous, even if such were the case (*Troy Iron &c. Factory v. Corning*, 45 Barb. 231).

II. In order to import into this case an equitable ground for the injunction, it is asserted that this association is a partnership; and upon that, that the general principles of partnership warrant the injunction, *i. e.*, whatever a partner may do, this plaintiff may do. (A.) This association is not a partnership. It wholly lacks the characteristics of a partnership.

They are like a partnership in nothing else than that they are not a single individual. They are not a joint stock association, nor a new invention, nor any thing indescribable. They are in fact a club—neither more or less than a club. These institutions are known to the courts, and their rights and status have been adjudicated upon in the English courts for a century. A club is a society which gives to its members social and personal rights and privileges, in such direction as they determine, within the whole range of social, artistic, literary, political, or business objects, &c., &c. Their main point is the strict qualifications for membership, and the conditions of its tenure. Their rights of property are the same as the rights of property in this association. The only point of distinction of this association from a club is the very point in which all clubs differ—the object (see Lindley on Partnership, page 62, and cases cited; and *Cox v. Hickman*, 8 H. L. Cas. 268; *Caldicott v. Griffiths*, 8 Exch. R. 898). (B.) Nor, in the second place, if this association were a partnership, would the special facts of this case warrant an injunction. The plaintiff has, in this association, a

personal or social right of attendance, and of doing his business there, in conformity with their rules and regulations, that is, in conformity with the provisions of his contract.

He has also his share in the accumulated fund. He is suspended, but not expelled, from membership. His personal right of attendance is gone, but his property is not forfeited or affected. This distinction, therefore, is applicable to this case. That the rules of law which protect rights of property, do not in like manner apply where simply personal or social rights, as here, are in question.

The cases in which injunctions have issued in actions between partners show that they issue against partners only where they have been guilty of a breach of the contract, or of misconduct in a point not covered by the contract (Eden on Inj. p. 220 ; 2 Lindley, Part. pp. 1002, 1009). Here no breach of the contract by the defendants is alleged (see *Hall v. Hall*, 12 Beavan, 414 ; *Watney v. Wells*, 30 Beavan, 56 ; *Harrison v. Tennant*, 21 Beavan, 482).

These cases show that, as against partners guilty of misconduct, but not of a breach of the contract, an injunction will not be issued to sustain a partner in his purely personal rights, where no rights of property are involved, and, further, where the continuance of the partnership was sought, the court would not fail to consider whether the injunction would not be to the mutual injury of the partners, in which case the partnership would be dissolved.

III. The provision for arbitration in the constitution was the subject of much criticism. It was argued : That the plaintiff was not bound by the arbitration clause. That he might refuse to arbitrate, and that no consequence attached to the refusal ; that a suspension must be preceded by a default. That he revoked the agreement to arbitrate, and that the law favors revocations. That he did not agree to submit ; but, only, that in case he did submit, the arbitration committee was to be the tribunal. That the arbitration committee had no power to determine the fact of default. That this court must pass upon it, as a question of fact and of law upon all the special facts of the contract, whether the plaintiff was in default within Art. 8, By-laws.

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IV. There is no rule or principle of law denying to a man the natural liberty of waiving a remedy before the tribunals of justice, and accepting as final, in respect to his rights, the act or arbitrament of some private person (see the recent leading case in House of Lords, *Scott v. Avery*, 5 H. L. Cas. 811).

It is clearly settled in this case that a man may contract for a final private adjudication of his rights, and make such arbitrament the condition precedent of some other right. This case has been followed in the Court of Exchequer, in *Horton v. Sayer* (5 Jur. N. S. 989); *Lee v. Page* (7 Jur. N. S. 768); and in *Scott v. Liverpool* (27 L. J. p. 641); *Tredwen v. Holman* (8 Jur. N. S. 1080); *Westwood v. Sec. State for India* (7 L. T. N. S. Q. B. 736); *Braunstein v. Accidental Ins. Co.* (31 L. J. Q. B. 17).

These cases are all reviewed in the recent case of *Elliott v. Royal Ex. Ass. Co.* (Law Rep. 2 Exch. 237). (See *Inman v. Western Fire Ins. Co.* 12 Wend. 459-60; *Ranger v. Great Western R. Co.* 27 Eng. L. and Eq. 46; *Northampton Gas Co. v. Parnell*, 15 Com. Bench, 651; *Faunce v. Burke*, 16 Penn. St. 479). These cases fully establish the principle that a man may, by contract, agree to waive his right to resort to the courts, and to submit any questions to private arbitration.

V. Now, under these rules, what is the plaintiff's position? He had agreed, by the constitution, that when a claim or matter of difference arose against him, it should be the duty of the arbitration committee to take cognizance of, and exercise jurisdiction over it. It was not a conditional agreement that, in case he elected to submit to arbitrate, they should be the tribunal; but a positive agreement that the committee should have jurisdiction of the subject-matter whenever it arose; and he further agreed that their decision should be binding. The moment Currie, Martin & Co. made claim against him, and he refused to acquiesce in it, the arbitration committee acquired jurisdiction of the subject-matter. Due notice was then given to him that they would hear the case; thus they acquired jurisdiction of the person of Mr. White. He stood at the meeting of two ways: (1.) He could submit to, and proceed before, the arbitrators. (2.) He could stand on what he was

advised were his legal rights, take the question away to the adjudication of the courts of law, revoke his submission, or in any way disregard the arbitration. The only thing he did do was to serve a protest.

The arbitration went on, the committee saw the documentary evidence, and decided against him. Then he again had this election: (1.) He could perform; in which case the incident would have terminated. (2.) He could refuse to perform, on any ground satisfactory to himself, and accept the consequence—his suspension. Now, there are two inevitable, necessary consequences: (1.) His suspension was the result of his own act. (2.) The fact of the default was ascertained, so far as the members of the association were concerned.

So far as it can come in question here, on this question of his membership, the award is binding on him. No question arises here concerning the correctness of the decision against the plaintiff, either in point of law or in matter of fact. Where one's rights are thus submitted to a private tribunal, there may be an action to relieve against fraud; for such a remedy may be had, not only as against the awards of arbitrators, but even against judgments of the highest courts (*Munn v. Worrall*, 16 Barb. 227).

Either at law or in equity, the judgments of a tribunal, constituted and chosen by the parties themselves, may be overhauled for fraud in the prevailing party, or for some misbehavior of the tribunal, as in refusing to bear evidence, or to hear the party, or the like; or for an excess of authority in assuming to decide a matter not embraced in the submission. But for error of judgment, however plain and palpable, there is no remedy; the party must abide the forum which he has selected; and he cannot have a writ of error, or an appeal to the legally constituted tribunals (*Van Vechten*, Senator, in *Underhill v. Van Cortlandt*, 17 Johns. 430; see pages 412, 413, 416, 421, 2 Story Eq. Jur. § 1451, *et seq.*; *Ketchum v. Woodruff*, 24 Barb. 147; *Phillips v. Evans*, 12 Mees. & W. 309).

VI. This is an attempt by a member of an unincorporated association to procure from the courts the same remedies for the enforcement of his social privileges therein, according to its

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articles of association, that the courts, by *mandamus* and injunction, have been accustomed to afford to members of corporations. It assumes that the courts will recognize the agents and servants of this society, as they would the officers of a corporation, and will compel them to perform their official duties by compulsory process, issued in regular actions of the same nature as those allowed to corporations. The relief asked in this action, and afforded by the injunction, is, that the plaintiff may have the full exercise and enjoyment of his rights and privileges as a member of the board, and that he may, at their meetings, transact all his business, in buying and selling stock, &c., fully, freely, and with the same facilities enjoyed by the other members, and as he enjoyed them previously to his suspension.

Now, this requires the court to interfere in the internal management of an association that has no legal existence, in favor of a member who has been suspended according to its rules, none of whose rights of property have been violated, in support of his purely personal and social rights against the other members, who have strictly followed their rules, and who have not been guilty of any misconduct.

This injunction is, in fact and substance, mandatory, and not prohibitory. The plaintiff's complaint is, that he is excluded from membership. The effect of the injunction is to direct the defendants to perform to him all the services they did before the suspension—to give him the same relief pending the action that he would gain by final judgment in his favor. Such injunctions "the court will not grant, except under very special circumstances." (Daniel Chy. Prac. 4th ed. p. 1503; *Hooper v. Brodrick*, 11 Simons, 47; *Isenberg v. East India Ho. Co.* 10 Jur. N. S. 221; *Durell v. Pritchard*, 35 L. J. 223; *Brown v. Monmouthshire Railway*, 13 Beavan, 32; *Bailey v. Birkenhead Railway*, 12 Beavan, 433; *Ex parte Ford*, 7 Vesey, 617; *Waters v. Taylor*, 15 Vesey, 19, 21; *Carlen v. Drury*, 1 Vesey and B. 154; *Thompson v. University of London*, 10 Jur. N. S. 669; *Brancker v. Roberts*, 7 Jur. N. S. 1185; *Mair v. Himalaya Co.* 11 Jur. N. S. 1013; *Chaplin v. N. W. Railway Co.* 5 L. T. Rep. 601; *Churchward v. Chambers*, 2 Foster and

Finlason, 229; *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Blisset v. Daniel*, 10 Hare, 493; *Hopkinson v. Marquis of Exeter*, before Lord Romilly, M. R., London Times, December 21, 1867; *Commonwealth v. Pike Beneficial Society*, 8 Watts and S. 250; *Commonwealth v. St. Patrick's Society*, 2 Binn. 443; *Innes v. Wylie*, 1 Car. & Kirwan, 262).

BY THE COURT.—DALY, F. J.—The organization known as the Open Board of Stock Brokers, which the plaintiff asks this court to restrain from depriving him of his rights and privileges as a member of it, is not a partnership, and the plaintiff is not entitled, as has been argued, to the equitable remedies which courts afford for the protection of the rights of a co-partner. It is not a union of persons joining together property, labor or skill for their common benefit, in any pursuit or business having a communion of profit and loss, and distinguishable by the feature that, if earned, there is to be a division of gains. It may be described as an association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and management of his separate transactions or business; which is not a partnership.

The objects of the organization are set forth in the articles of association, which declare that greater facilities are requisite for the exchange and negotiation of commercial securities, a business which can be successfully transacted only where there is the utmost confidence; that, as such confidence is begotten only by public, open, fair and upright transactions, so that each party interested can know not only where but how such business is done, the spirit of the age demands for such transactions a great public mart, open to all; and that, for the purpose of supplying these requirements, the persons signing their names associate themselves together, and adopt a constitution for an association to be known as the Open Board of Stock Brokers, each pledging himself to abide by the constitution, and by all by-laws, rules and resolutions which may be passed by the board. To carry out this object, the constitution provides that

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there shall be a room where the members of the board shall have seats and desks, conveniently inclosed within a railing, and that outside the railing, and in a gallery, seats shall be provided for the public; certain officers are designated who are to call stocks at the board, and a standing committee to arrange the order in which such securities are called. A record is to be kept by the secretary of all sales and purchases made at the board. He is required to prepare an account of the same for the newspapers, and no fictitious sales are to be allowed. It is, in fact, the creation of a public mart for the sale of stocks or other commercial securities, each purchase or sale of which is not for the joint benefit of the body, but is, as it would be in any other place, an individual transaction between the parties making it. It is analogous to what, in other branches of commerce, has long been familiarly known by the word "*Change*,"—a fixed place, where merchants meet at certain hours for the transaction of business with each other, subject to such general rules or understanding as they think proper to be governed by. There may be property belonging to this body, derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation, and not in the pew-holder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets (*In re The St. James Club*, 13 Eng. Law & Eq. Rep. 592; *Fassett v. The First Parish in Boyleston*, 19 Pick. 361). This Board of Stock Brokers is in fact analogous to the organization which came under consideration in *Caldicott v. Griffith* (8 Exchq. R. 898), called *The Midland Counties Guardian Society for the Protection of Trade*, which was decided not to be a partnership. So far, therefore, as the plaintiff claims the equitable interference of this court upon the assump-

tion that this association is a copartnership, or upon the ground that the rules which regulate the action of courts of equity in cases of partnership are to be applied to it, the claim cannot be supported.

It is not an incorporated body, and as a number of cases have been cited upon the argument in which courts of equity have interfered and restored a member of a corporation who had been expelled or obstructed in the exercise of his franchise by the acts of the corporation, which are relied upon by the plaintiff as authorities applicable to the present case, it will be necessary to inquire into the reasons why corporations cannot expel members except in certain extreme cases, and to show that these reasons do not apply to a voluntary unincorporated body, which comes into existence by the mutual agreement of the persons forming it, and is thereafter carried on under rules which the body adopts for its government. A member of a corporation, whether it be municipal, eleemosynary or private, is in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute, or exists by prescription, and therefore cannot be taken away by the act of the corporation, except, as I have said, in certain extreme cases. As it is a right conferred by statute, or derived from immemorial custom, which implies the existence of a grant, it can neither be taken away by the act of the corporation, or withheld by the act of the corporation, from any one eligible to the enjoyment of it. Thus, in *The People v. The Medical Society of the County of Erie* (32 N. Y. R. 187), an incorporated medical society was compelled by *mandamus* to admit a licensed physician to membership, who was excluded under a by-law which had been adopted by the corporation.

In a corporation, there is a distinction between what is called *amotion*, or the right to remove an officer, which is a power inherent in every corporation, and *disfranchisement*. The former may be exercised without interfering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an absolute expulsion of the member from the body, and the taking away of his franchise, which cannot be done unless the power is given by the charter creating the

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corporation, or the member has been guilty of crime, a conviction of which would work a forfeiture of all civil rights, including the corporate franchise, or has committed acts which tend to the destruction of the corporation, such as the defacing of its charter, the obliteration or alteration of its records, or other acts tending to impair or destroy its title to its rights or privileges; in which case, the expulsion of the member is but the exercise of a power incident to the right of self-preservation (*Evans v. The Philadelphia Club*, 50 Pa. St. R. 107; *Bagg's Case*, 11 Coke R. 93; *Eurle's Case*, Carthew's R. 173; *Commonwealth v. St. Patrick's Benevolent Society*, 2 Binney R. 441; *Fuller v. The Trustees of Plainfield Academy*, 6 Conn. 532; *People v. The Medical Society of Erie*, 24 Barb. 570; Willcock on Municipal Corporations, 270; Grant on Corporations, pp. 263, 264, 265, 266).

But in an unincorporated voluntary association, like the one now under consideration, the privilege of membership is not given by statute or derived through prescription, as in a corporation, but is created by and conferred by the organization itself. It is not a franchise—a franchise being a particular privilege vested in individuals, which is conferred by a grant from a sovereign or government (Finch's Law, 164; 3 Kent's Com. 458); while, on the contrary, the privilege of membership in a voluntary association is derived exclusively from the body that bestows it, and may be conferred or withheld at its pleasure. The law cannot compel such an organization to admit an individual to membership, as may be done in the case of a corporation, nor can it interfere to restore a member who has been deprived of the privilege for not complying with the conditions upon which the enjoyment of it was made to depend. A member of a body of this description has, as such, undoubtedly, rights which the law will protect, but they do not rest upon the same ground, and are by no means coextensive with the franchise enjoyed by a member of a corporation. They depend upon the nature of the organization, upon the object for which it was formed, and upon the rules, regulations, constitution or by-laws which are explanatory of its purpose, and which the body has adopted for its government.

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Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them, to have assented to them, and they are bound by them (*Innes v. Wylie*, 1 Car. & Kir. R. 262; *Brancker v. Roberts*, 7 Jur. N. S. 1185; *Hopkinson v. The Marquis of Exeter*, London Times, Dec. 31st, 1867, Law R.; 5 Eq. Ca. 63).

Such an organization may prescribe the conditions upon which persons will be admitted to membership, as well as the conditions upon which the continuance of membership will depend; and where they have no regulation upon the subject, they may expel a member by a vote of the majority, if he has been notified of the charge against him, and afforded an opportunity of being heard in his defense (*Innes v. Wylie*, *supra*). Voluntary bodies of this kind will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where a member is expelled in conformity with the rules, and the proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere (*The Commonwealth v. The Pike Beneficial Society*, 8 Watts & Serg. 250). The only question, therefore, that can arise in the present case is whether the plaintiff was suspended from the privileges of a member of this Open Board of Stock Brokers in accordance with the constitution and by-laws which that body has adopted for its government; for if he was, he has no ground of complaint.

The by-laws of the board provide that whenever a member is in default on any contract, and the fact becomes known to the committee on membership, they shall, after due investigation, report the same without delay, through their chairman, to the president of the board, who shall at once declare the member so reported suspended from all the privileges and immunities of the organization; and that the member may, within sixty days, appeal and demand a hearing before the executive committee, who are required to give notice at the board at least five business days before the hearing of the appeal, to

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enable any person interested to present objections. The executive committee are required by the by-law to report the result of their investigations, and if it appear that the complaint is just, the declaration of suspension is to be confirmed, otherwise annulled. It is provided, in addition to this, by the constitution, that there shall be an arbitration committee to take cognizance of and to exercise jurisdiction over all *claims* and all *matters of difference* between the members of the board, whose decision shall be binding. And the constitution further provides, that an appeal may be taken from the judgment of the arbitration committee to a board of appeals, which board, it is declared, shall take cognizance of all cases of appeal from the judgment of the arbitration committee.

The plaintiff had a contract with the firm of Currie, Martin & Co., who are also members of the board, for the purchase by them from the plaintiff of a thousand shares of the Hudson River Railroad stock, to be delivered at the plaintiff's option, at any time during the year 1867. After the making of this contract, the Hudson River Railroad Company adopted resolutions increasing the capital stock of the Company, in which they provided that the persons in whose names stock should be standing on the 10th of April, 1867, might, before the 15th of the month, subscribe for an equal amount of the additional stock, at one-half its par value. Currie, Martin & Co. claimed that, under the contract, the plaintiff was bound to subscribe for one thousand shares of the additional stock for them, insisting that they were rightfully entitled, under the contract, to the benefit of the increase; but this claim the plaintiff refused to admit. By the conditions of the contract, either party were entitled to call for additional deposits, from time to time, to meet the fluctuations in the market; and by a by-law of the board, either party, upon all time contracts, may call, at any time during the continuance of the contract, for a united deposit of ten per cent.; and if either party fail to comply, the other may elect to close the contract.

Currie, Martin & Co. made a call upon the plaintiff for an additional deposit of ten per cent., making an additional deposit of the amount themselves; but the plaintiff refused to

make any additional deposit, whereupon Currie, Martin & Co. elected to close the contract, and notified the plaintiff that they would purchase two thousand shares of the stock for his account and at his risk, under another by-law of the board, which provides, that if any member neglect to fulfill his contract after being duly notified, the other party may employ any one of certain designated officers of the board to buy or sell the stock, as the case may be, either in open market or at the board, accounting to the member in default for any surplus, and charging him with any deficiency. Upon receiving this notice from Currie, Martin & Co., the plaintiff sent a notice to the president of the board protesting against the purchasing of any of the stock upon his account, under the contract, claiming that he was not in default; but the president complied with the request of Currie, Martin & Co. and purchased two thousand shares, and Currie, Martin & Co. notified the plaintiff of the purchase as a purchase under the rule, upon his account and at his risk; which purchase was made at a rate creating a difference in their favor, and, as they insisted, against the plaintiff, of \$69,633.34.

This sum Currie, Martin & Co. claimed of the plaintiff, and he refused to pay it, whereupon they brought the question, as a claim and matter of difference under the provision in the constitution heretofore referred to, before the arbitration committee, demanding that they should inquire into and decide it; and the committee appointed a day for the hearing, and notified the plaintiff to appear before them and interpose whatever objection or defense he might have; to which the plaintiff replied by a written communication, declining to appear before the committee, protesting against their jurisdiction in the matter, and declaring that no matters of difference had arisen between him and Currie, Martin & Co., that that firm had no claim of any kind against him, that the contract made with them was in full force and effect, and that nothing had arisen under it calling for any action of the arbitration committee.

Upon the day appointed, Currie, Martin & Co. appeared before the committee, and the plaintiff did not. The former presented their claim and gave evidence of the facts upon

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which it was based, and the committee, by a report or award in writing, decided that Currie, Martin & Co. were entitled, under the contract, to one thousand additional shares of the stock, having notified the plaintiff that they elected to subscribe for the same; that the plaintiff was in default, having failed to respond to Currie, Martin & Co.'s call for an additional deposit; that by the by-laws it was, after such default, at the option of Currie, Martin & Co. to elect to close the contract, and that they did elect to close it; and the arbitration committee rendered, as they expressed it, judgment in favor of Currie, Martin & Co., and against the plaintiff, for the sum of \$69,633.34.

Currie, Martin & Co. then made known to the committee on membership the decision of the committee on arbitration, and the committee on membership, upon due investigation, as it is averred in the answer, reported to the president that the plaintiff was in default upon his contract with Currie, Martin & Co., upon which the president declared the plaintiff suspended from his privileges as a member of the board. The plaintiff appealed from the act of the president to the executive committee, but before any decision was had upon this appeal he brought this action to restrain the president and the members of the board, by injunction, from interfering with him in "the full and free exercise and enjoyment of all his rights, privileges and franchises" as a member of the body. He avers in the complaint that he has daily and repeatedly urged upon the president the calling of the executive committee together, and the granting to him of a hearing, but has been unable to procure it, from the failure of a quorum to attend; and alleges, upon information and belief, that, the failure and delay was at the instigation of Currie, Martin & Co., and was part of a general plan on their part, and other members of the board, to deny him justice and prevent him enjoying his privileges as a member; while the president avers in answer, that he took measures to call the committee together, but that the plaintiff brought this action before a meeting could be had—before it was possible to give any kind of reasonable notice to its members, and before the committee could

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give the notice required by the by-laws ; so that this averment on the part of the plaintiff of an intentional delay, which he makes upon information and belief, must be regarded as substantially denied ; in addition to which, the president avers, that after the service of the preliminary injunction, a meeting of the committee was had, and that the plaintiff was notified that they were willing and desirous that he should appear before them and have a hearing, and that he appeared before them, after consulting with his counsel, and refused to prosecute his appeal, protesting against and forbidding the committee to take any action in the matter.

The effect of this award made by the arbitration committee has been elaborately discussed upon the argument ; but many of the points raised do not and cannot come under consideration here. Currie, Martin & Co. are not defendants in this action, nor is this a proceeding to confirm the award and for judgment in accordance with it. We are not called upon, therefore, to say whether it did or could have any effect upon the legal rights of the parties to the contract for the purchase of the stock ; nor whether the by-law of the board under which the committee acted had the same effect as an ordinary submission in writing of a matter in difference to arbitration, so as to be conclusive upon the parties upon the award being made ; nor whether the protest of the plaintiff was a revocation of the submission which, in an ordinary arbitration, is a right which either party may exercise at any time before the matter is finally submitted, upon a hearing, for a decision of the arbitrators. The action of this committee comes under consideration here merely as a part of the proceedings by which it was determined that the plaintiff should be suspended from the privileges of a member of the board, and it is only in that light that I shall consider it.

The constitution declares that the by-laws shall provide for the expulsion, suspension, and readmission of members for cause, and the by-laws declare that a member being in default in any contract shall be a cause for suspension. The committee on membership, when it is made known to them that a member is in default, are, upon due investigation, to report the fact to

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the president, who must thereupon declare the member suspended, leaving him his right of appeal to the executive committee; and, as I understand the law, the further benefit of the judgment of the whole body, when the executive committee report the result of their investigation.

The by-law having provided a mode for reviewing and correcting any error or injustice on the part of the committee on membership in reporting to the president that the plaintiff was in default, he was bound to avail himself of the remedy provided by the constitution and by-laws of the body of which he had become a member, before he can ask a court of equity to investigate a proceeding not necessarily final in the body itself, but which was there subject to review, and might be annulled by the action of a committee expressly clothed with authority to investigate it (*Carlen v. Drury*, 1 Ves. & B. 154).

He must, in consonance with the rule upon which Lord Eldon acted in the case above cited, resort to the remedy which is provided by the constitution and by-laws of the association itself, before he asks a court of equity to interfere, unless by evasion, intentional delays, or other unjust procedure, he is practically deprived of the benefit of that remedy, which in this case is substantially denied by the answer.

It is averred in the answer that the committee on membership reported the plaintiff to be in default, upon due investigation, and this is all that is required by the by-laws to authorize the suspension of a member by the president. The by-law does not provide how this investigation shall be made, but the law will intend that it means an investigation on the part of the body, in which the member to be affected shall be afforded the opportunity of being heard. What shall or shall not constitute a default upon a contract, so far as it affects the continuance of membership, is a matter which a body like this has the right, in my judgment, to determine for itself; and where it acts in good faith, and the investigation is conducted in the mode provided by the constitution and by-laws, no judicial tribunal would assume the right to reverse and set at naught its decision. As the constitution and by-laws have provided for a standing committee, who are to take cognizance

of and exercise jurisdiction over all claims and matters in difference between members, and whose decision is to be binding upon them, that would seem to be the appropriate tribunal in this body to investigate and decide whether a member is or is not in default, the more especially as provision is made for reviewing and correcting the decision, if erroneous, by an appeal to another tribunal of the board, called the board of appeals. When a claim, therefore, is made by one member upon another, and he brings the matter in difference before this arbitration committee, and they, after having notified the other, and afforded him the opportunity of being heard, investigate the claim, and decide that the other party is in default, that is, in my judgment, a "due investigation" within the meaning of the law. It never could have been the design of the by-law that the committee on membership are also to sit in deliberation upon the matter, and investigate it over again, before they are authorized to report to the president that the member is in default. It is due investigation on their part when they inquire and ascertain that the arbitration committee, whose decision is binding and subject to review, have decided, in a matter legitimately before them, that a member is in default. A second investigation would be superfluous, and was not, in my judgment, contemplated by the by-law.

The plaintiff avers, upon information and belief, that some of the members of the arbitration committee were already prejudiced against him, having repeatedly expressed an opinion favorable to Currie, Martin & Co.; to which ground of complaint there are several answers: In the first place, this allegation is too general and indefinite. The names of the members referred to are not given. It is not known whether they are or not defendants in this suit; so that this allegation is incapable of a specific denial by answer on the part of those who could alone make it; in addition to which, the president, in his answer, denies, so far as he has any knowledge or information, that any member or officer of the board has at any time taken any side or combined or in any manner acted with or at the instigation of Currie, Martin & Co., against or to the prejudice of plaintiff, or *interfered in any way or manner, ex-*

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cept so far as the constitution and by-laws required them to. In the second place, the plaintiff did not, when notified to appear before the committee, place his objection upon any such ground, but his written protest against the action of the committee was put upon the ground that no matters of difference had arisen between Currie, Martin & Co. and himself; that that firm had no claim against him of any kind, and that nothing has arisen under the contract calling for the action of the committee; in which he was mistaken; for a matter in difference had arisen between him and Currie, Martin & Co., as he and they differed in their understanding of the contract. They acted upon their construction of it, and the result was a claim by them against him, under it, for a large sum of money, which claim they brought before the committee, the committee having, under the constitution, cognizance over all claims between members; so that something had arisen calling for the action of the committee. And, in the third place, if some of the committee were, as the plaintiff supposes, prejudiced against him, and had, before taking any action in the matter, expressed opinions favorable to Currie, Martin & Co., the action of the committee was not final. The plaintiff could have appealed from their decision, if it were erroneous or unjust, to the board of appeals, and he should have resorted to the remedy provided for him within the board, before he could ask a court of equity to interfere upon the ground that the arbitration committee were prejudiced against him.

For these reasons I am of opinion that the proceedings upon the plaintiff's suspension were regular; that they were in accordance with the constitution and by-laws; that nothing has been shown that would authorize this court to interfere, and that Judge Van Vorst was right in dissolving the injunction at special term.

Judge Brady concurred.

Judge Barrett, having been of counsel in the cause while at the bar, took no part in the decision.

Order at special term affirmed.

HUGH MEEHAN v. GEORGE E. WILLIAMS, SARAH J. K. WILLIAMS, JOHN A. WILLIAMS, *impleaded with* WILLIAM J. HARGROVE, MICHAEL CLARE, and JOHN HEANY.

Where, in a proceeding instituted by a contractor under the Mechanics' Lien Law of 1863, it appeared that, after the commencement of the work, but before its completion, and the filing of the notice of lien, the owner conveyed the premises to her brother-in-law, one of the defendants, who gave her his note for \$5,000, payable one day after date, and upon which no payments had been made, and who never took possession of the premises, but immediately leased them to his sister-in-law and her husband, who had since occupied them, paying no rent therefor; *held*, that the conveyance was not *bona fide*, but was made with the intent to defraud the contractor, and defeat his lien, and that the latter had an incipient lien when the transfer was made, which became absolute on filing notice thereof with the county clerk, and that he was entitled to have the fraudulent conveyance declared void so far as it interposed any obstacles to the enforcement of his lien.

The plaintiff contracted with the owner and her husband to erect a house by the 15th day of February, 1865, the consideration to be paid in seven installments, on the completion of certain portions of the work. The husband, who had been a builder, visited the building every other day, and directed changes to be made and extra work to be done, and paid the plaintiff as the payments became due, making no objection to the work done and materials furnished, nor to the delay in the work of plastering. The house was not completed on the 15th February, 1865. Ten days after that date, the plaintiff received from the husband payment of the fourth installment under the contract; and on the 17th day of March was promised payment of the fifth installment, as soon as certain moldings should be put on. The contract provided that on failure of the plaintiff to provide a sufficiency of men or materials, the owner, on giving three days' notice in writing, might complete the building, and deduct the expense from the contract price. The owner and her husband, on the 23d March, 1865, gave notice to the plaintiff to discontinue work, and that they would hold him for damages for failing to complete the building by February 15th.

Held, that the husband acted throughout as his wife's agent and by her authority, so as to make all that he did binding on her.

Held, that as the variations from the contract in the building were known to the husband, and he had not objected, they were made with his concurrence, and that there was an acceptance of the work up to the time of the payment of the fourth installment. *Held*, also, that the owner, having assented to an extension

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beyond the strict letter of the contract, had no right, on March 23d, to put an end to the contract, and the plaintiff could recover for all the contract and extra work done and materials furnished up to that date, and the owner, under the circumstances, could not recoup damages for delay and deficiencies in the work.

Under the Act of 1863, the lien becomes absolute, to the extent of the right, title, and interest which the owner had in the premises, at the time when the notice was filed, which interest cannot be divested by any sale or transfer made after the commencement of the work or furnishing of materials.

In an action to foreclose a mechanic's lien, a judgment directing the sale of the premises under execution, and providing the manner in which the proceeds shall be distributed, is in strict conformity with the statute.

APPEAL from a judgment entered on the report of a referee, and the order confirming said report.

This was a proceeding to foreclose a mechanic's lien, under the Act of 1863, and was brought by the contractor against the owners and subsequent lienors. Issue having been joined, the action was referred to Samuel F. Barger, Esq., to hear and determine the issues therein.

On November 9th, 1864, the plaintiff, by a written contract with the defendants, George E. Williams and Sarah J. K. Williams, his wife, agreed to erect and finish a building, on 120th street, near Second avenue, owned at that time by Sarah J. K. Williams, for the sum of \$3,475, to be paid in seven installments, as stated portions of the work should be completed. The house was to be finished by the 15th day of February, 1865. It was agreed in the contract that, in case of the contractor's neglect to supply a sufficiency of materials or workmen, the owner, after three days' notice in writing being given, might finish the work, and deduct the expense from the contract price. The plaintiff commenced the work, and testified, on the trial, that finding the weather too cold, he informed Williams and his wife that it would be impossible to do the plastering till the weather moderated, and as they did not object, the house was not finished by the 15th of February, 1865. This was denied by the defendants, Williams testifying that plaintiff promised to build fires in the rooms, so as to go on with the

work. The defendant, George E. Williams, who had been a practical builder, was at the house nearly every day, and had many changes made and extra work done, and paid the plaintiff money, &c. Ten days after the time limited in the contract for the completion of the building, the defendant, George E. Williams, paid the plaintiff the fourth installment, without any objection as to any delays or defects. On the 17th day of March, 1865, Sarah J. K. Williams executed a deed of the premises to her brother-in-law, the defendant, John A. Williams, who never occupied the premises, but subsequently leased them to said George E. Williams and his wife for five years, and they continued to occupy the house after its completion, and had never paid any rent to the said John A. Williams. The only consideration given by John A. Williams for said deed or conveyance was his note for \$5,000, payable one day after date, and no payment had been made thereon. On the 23d day of March, 1865, defendants, George E. and Sarah J. K. Williams, notified the plaintiff to discontinue work, on the ground that he had failed to complete the house by the 15th February, 1865, and that they claimed damages for such failure. The plaintiff did so, and filed his notice of lien on the 24th day of March, 1865, for the work done and materials furnished, and extra work done since the fourth payment. The claims of the defendants, Hargrove and Clare and Heany, were admitted as sub-contractors. On the trial many witnesses were examined as to the quality of the work and materials. The referee, declining to find as requested by the defendants, found and reported :

1. That the acts of the defendants, George E. Williams and Sarah J. K. Williams, amounted to a waiver of all variances from the contract, up to and including the fourth payment, and an acceptance of the work up to that time.

2. That the conveyance from Sarah J. K. Williams to John A. Williams was not a *bonâ fide* conveyance, but was made with intent to defeat the plaintiff's lien.

3. That the plaintiff had acquired a lien as a contractor for his work done and materials furnished, and that he was entitled to judgment for foreclosure, and satisfaction for the sum of \$866.21, &c.

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From the order confirming the report the defendants, Williams, appeal to the general term of this court.

A. H. Reavy, for the appellants, Williams.

Meehan abandoned the work. It is not enough for him to say, that because a mere notice was received by him, he was justified in leaving the work. He should establish that he was so prevented as to render it impossible for him to continue. The defendants had a right to complete the house at a reasonable time, and did so at an expense of \$1,830, which, being more than the plaintiff would be entitled to had he completed the work, the referee should have found for the defendants (4 E. D. Smith, 724). Where there are deficiencies in work done under a contract, although the defendants accept the work, they may claim damages therefor by way of recoupment (1 Hilt. Rep. 389). The referee erred in adjudging the premises to be sold. All that could be sold (if plaintiff was entitled to judgment) was the right, title, and interest of Mrs. Williams therein (20 N. Y. R. 247; Ses. Laws, 1863, p. 860, sec. 2; 19 N. Y. Rep. 440). The conveyance to John A. Williams was made in good faith. The *bona fides* of it, however, could not be inquired into, as the cause of action to set aside a conveyance upon the ground of fraud could not be blended with a proceeding to foreclose a mechanic's lien in the same case. Under the Act of 1863, sec. 1, a contractor, &c., can have a lien only to the extent of the right, title, and interest then existing of the owner of the premises.

Chas. A. Rapallo, for plaintiff and respondent.

The decision of the referee upon questions of fact will not be disturbed, unless very clearly against evidence (*Sinclair v. Tallmadge*, 35 Barb. 602). Even though Mrs. Williams had not been cognizant of all the acts of her husband, yet, having once allowed him to act as her agent in the management and general direction of this work, she would be bound by his acts

(*Calvin v. Currier*, 22 Barb. 371; *Owen v. Canoley*, 42 Barb. 105). An express consent in words is not necessary to excuse delay or variations. Assenting or delaying objections thereto is a sufficient waiver (*Sinclair v. Tallmadge*, 35 Barb. 602; *Smith v. Gugerty*, 4 Barb. 614; *Flynn v. McKeon*, 6 Duer, 203; *Lawrence v. Dale*, 3 Johns. Ch. 23). The full performance of the work was prevented by the wrongful acts of the defendants. The referee did not err in refusing to find that the defendants are entitled to recoup damages for delay, or for variances in workmanship. All such delays or variances were assented to or waived by the defendants. Performance waived or prevented by the defendant is full performance; and a party cannot take advantage of nonperformance, if it is caused by his own act (*Farnham v. Ross*, 2 Hall, Superior Court R. 167; *Green v. Haines*, 1 Hilt. 254). No damage to the defendants was proved. On the question of defects in workmanship, the testimony is greatly in favor of the plaintiff. The Law of 1863 gives the mechanic a lien "to the full and fair value of work and materials," "and notwithstanding any sale, transfer, or incumbrance made or incurred at any time after the commencement of the work, or furnishing of materials." Hence, no conveyance made after the commencement of the work, and within three months from the time of its completion, can defeat the lien. The law of 1863 was intended to prevent fraudulent conveyances from injuring the mechanic, and to mitigate the severity of the decisions under the laws of 1851 and 1855 (*Blauvelt v. Woodworth*, 31 N. Y. 285). The lien law of 1863 is not unconstitutional. Under that law, it is the act of commencing to do work, or to furnish materials, which creates the equitable lien, as work done upon personal property in ordinary cases of bailment does. The filing of notice is a requirement for putting in legal form a previous equity. The law merely requires purchasers, before their contracts are completed, to look beyond the lien docket, and learn by inquiry whether any work has been done upon the property within three months which remains unpaid for (*vide Blauvelt v. Woodworth*, 31 N. Y. 285). The conveyance to John A. Williams was a fraud upon the plaintiff. The case

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stands precisely as if no such conveyance had been made, and Mrs. Williams had continued the nominal, as well as the actual, owner from the time the contract between herself and the plaintiff was made, until the notice of lien was filed. The plaintiff only asks that a conveyance made to defraud him of this debt shall not be suffered to prejudice him in his action to enforce it.

John A. Foley, for respondent, Heany.

David McAdam, for respondents, Hargrove & Clare.

BY THE COURT.—DALY, F. J.—The evidence fully justified the finding of the referee, that the conveyance of the premises to John A. Williams was not *bonâ fide*, but was made with intent to defraud the plaintiff and defeat his lien. The plaintiff had a right to impeach its validity in this action. He had an incipient lien when this transfer was made, which became absolute, under the Act of May 5, 1863, when the notice was filed with the county clerk. The Act of 1863 provides that incumbrancers may be made parties in the action or proceeding, to enforce the lien. John A. Williams, to whom this fraudulent conveyance was made, comes under the denomination of an incumbrancer, and as such was made a party; and the plaintiff, having established in the action that he was a creditor of the fraudulent grantor to the extent of \$866, was entitled to have this conveyance declared void, so far as it interposed any obstacle to the enforcement of his lien (2 Rev. Stat. 137, § 1; *Clute v. Fitch*, 25 Barb. 432; *Van Etten v. Hurst*, 6 Hill, 311). The Act of 1863 declares that the court may determine the rights of all the parties, and that such judgment or decree shall be made as to the rights and equities of the several parties *among themselves*, and as against any owner, as may be just (§§ 2, 5, 7). This is ample to confer upon the court, in this action, the power to give relief against this conveyance, and to declare it, as against the rights of the plaintiff, to be fraudulent and void; and the conveyance, having been adjudged to be fraudulent and void, it becomes unnecessa-

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ry to consider whether there is any thing in the objection raised to the constitutionality of the provision in the Act of 1863, which declares that the lien shall become absolute, notwithstanding any sale, transfer, or incumbrance made after the commencement of the work or the furnishing of the materials.

The plaintiff testified that he could have completed the work by the 15th of February, but for a delay arising from the impossibility of plastering on account of the weather. Several of the defendants' witnesses testified that the delay in the plastering could have been avoided by putting up stoves in the building and keeping up fires to dry the walls, and Williams and his wife swore that the plaintiff said to them that he would do so. This the plaintiff denied, and gave a very different version of what passed between him and Mr. and Mrs. Williams upon the subject, while one of his witnesses, a plasterer, testified that fires will not have much effect in drying walls. The evidence upon this head being conflicting, we must assume that the referee found that the testimony on the part of the plaintiff was the more reliable, and that testimony was to the effect that both Williams and Mrs. Williams assented to the delay. The plaintiff swore that he told Williams that it was impossible to do the plastering on account of the weather; that if he insisted upon having it done it would tumble when a thaw came, and that Williams answered that he did not want it to tumble on him—in which connection it may be remarked that the plaintiff swore that Williams told him when he ordered the extra work to be done, that he owned the premises, and that Williams never told him at any time that his wife was the owner of the property. The plaintiff testified, further, that he told Williams, that he, the plaintiff, would be obliged to wait until the weather would permit, and that Williams replied that the weather might change, and he must get at it as quick as he could, making no objections to the delay. When further interrogated upon this point, the plaintiff stated that there were two carpenters present, whom he named, when this conversation occurred, and that Williams said that he wanted the plaintiff to get on as *soon as he could*, and that Mrs. W.

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said that she did not want to move into the house before it was perfectly dry. We have here the fact that neither he nor she made any objections to the delay, and in addition a much more important circumstance, in respect to which there was no conflict, that is, that Williams, in the presence of his wife, paid the plaintiff the fourth installment ten days after the time limited *in the contract* for the completion of the building. Williams swore that he never agreed with the plaintiff to extend the time, that his wife never authorized him to do so or to modify the contract, and her affidavit was read to the same effect. But this was rather swearing to a conclusion than controverting the specific testimony from which a different inference was drawn. He did swear that he did not tell the plaintiff that if the work could not be done in cold weather he did not want him to do it; but this was contradicting what was sworn to by the plaintiff; and the referee believed the plaintiff.

The evidence was ample to warrant the referee in finding that Williams acted throughout in the whole matter of the erection of the building as his wife's agent, and by her authority, so as to make all that he did binding upon her. From the peculiar relation of the parties, that of man and wife, evidence by no means as conclusive as that which was given in this case would have been sufficient to show that such was the fact. According to his own statement, he had worked as a practical builder; he had put up, and for nine or ten years he had a knowledge of, and was familiar with, mason and carpenter work. He was about the premises generally every other day, superintending and directing the work, and carefully examined, at times, according to his own statement, the manner in which it was done, and the quality of the materials furnished. He ordered changes to be made and extra work to be done, and the bill for the extra work was given to him. He signed the contract for the erection of the building, and when the plaintiff wanted Mrs. Williams to sign it, Williams, according to the plaintiff's statement, "did not seem to want her to." He made four payments to the plaintiff in his wife's presence. She never gave any directions to the plaintiff to make

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any changes, but many changes were directed to be made by Williams, some of them involving extra work, for which he paid, and the plaintiff testified that what he meant by Williams having the superintendence of the work was, that it had to be done to suit him. Mrs. W. was once at the building while the plaintiff was there, and all that he ever had to do with her respecting it was when she told him she did not want to move into a damp house. When the plaintiff called at Williams' house for the last two payments, he saw Mrs. W., who told him that her husband was out, that he would soon be in and pay him, as he had the money; and the written notice to stop the work was given to the plaintiff by Williams, who said that he had sold the house, that the plaintiff had no liens against it, and that he must get his money the best way he could. No other conclusion could be arrived at upon this evidence but that Williams was acting throughout in place of his wife, as her agent and by her authority; that there was an understanding between them that every thing relating to the matter should be entrusted to him; that he, and not she, was to judge whether the work conformed to the contract; that he was clothed with authority to make or permit any alterations or changes he thought proper; to order extra work if he deemed it advisable, and to do every thing which she could or might do, either as one of the parties to the contract, or as the owner of the premises, or as the one for whose exclusive benefit the building was erected, and that his acts were to be binding upon her (*Colvin v. Currier*, 22 Barb. 373; *Owen v. Canoley*, 42 Barb. 105).

Many of the variations were made by his express direction. This we must assume that the referee found wherever the testimony of Williams was in conflict with that of the plaintiff. The plaintiff denied that he made any other variations, and if the fact were otherwise, they were made under the eye of the husband, without any objection on his part at the time, he superintending the erection as the agent of his wife, and being, as proved by himself, an expert. The referee, therefore, was justified in concluding, that if made they were made with

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his concurrence, and that after they were made there was an acceptance of the work up to the time of the payment of the fourth installment (*Sinclair v. Tallmadge*, 35 Barb. 605). Williams testified that he discovered the variances or defects while the work was going on, and as he made no remonstrance or objection at the time (for the plaintiff testified that he made no objections whatever), it must be assumed that he regarded them as immaterial, and waived them, as an architect or other expert, similarly employed, might have done on behalf of his principal. That he did so is to be inferred, not only from the fact that he knew of them and made no objection, but from the fact that he afterward promised to pay the plaintiff the fifth installment *as soon as certain moldings should be put on*, showing that that was all that he considered essential to entitle the plaintiff to the payment of the fifth installment. This was very conclusive, and fully justified the referee in finding that he had, in his capacity as an expert, waived all such defects and variance as immaterial; that, as many changes or alterations had been made by his express directions, he considered the work up to that time, with the single exception stated, as a substantial compliance with the contract. The referee was clearly right in holding that all such variances and defects were waived, and in inferring from the circumstances that Mrs. Williams and her husband, acting as her agent, assented to an extension of the time beyond the strict letter of the contract (*Smith v. Gugerty*, 4 Barb. 614; *Flynn v. McKeon*, 6 Duer, 203; *Lawrence v. Dale*, 3 John. Ch. 23).

On the 16th of March, 1865, Mrs. Williams made the fraudulent conveyance of the premises to John A. Williams, and on the 23d of the same month she and her husband gave a written notice to the plaintiff, directing him to discontinue the work, accompanied by the declaration of Geo. E. Williams to the plaintiff before referred to. The notice advised the plaintiff that others would be employed to complete the building, that the cost thereof would be charged to his account, and that the parties, Williams and his wife, would claim damages from him for the nonperformance of the contract, as they had

been kept out of the occupancy of the building and prevented from letting it. This notice did not purport to have been given under the provision in the contract which gave the parties, if the plaintiff should neglect to supply a sufficiency of materials and workmen, the power to provide both, and finish the building upon giving him three days' notice in writing, the expense to be deducted from the amount of his contract; and if it had been, there was no proof that he had neglected to supply a sufficiency of workmen or of materials; but, on the contrary, evidence that he was amply supplied with both. The notice, in fact, by its express terms, was upon the ground that the plaintiff had failed to complete the building by the 15th of February, 1865, and as the parties had, as the referee has found, assented to an extension of the time beyond that period, they had no right, on the 23d of March, to put an end to the contract upon any such ground. As the plaintiff, however, was directed to discontinue the work on the contract, he did so, and was at least entitled to recover what the referee awarded to him—the fifth installment of \$400—he having done all the work and furnished the materials entitling him to that payment; \$400, as the value of the portion of the work done and of the materials furnished under the sixth and seventh installments, and \$66 for extra work; in all, \$866. The question put as to the value of the work done and the materials furnished up to the time when the plaintiff left the building, the amount of money paid by him for materials and labor from the time he commenced, what was the value of all the work done by him and of all the materials he furnished, were properly excluded. The information they sought to elicit was immaterial. It could have no bearing on the measure of damages, which was the contract price when the installment was due, and the value of the materials furnished, and of the work which had been performed beyond that, when the progress of the work was arrested by the order of the owner and her agent, before the plaintiff could complete it to the point which would have entitled him successively to the sixth and seventh payments.

Williams and his wife having assented to the delay oc-

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casioned by the impossibility of plastering from the cold weather and hard freezing, the plaintiff was bound to complete the building within a reasonable time after change in the weather allowed him to resume the plastering (*Green v. Haines*, 1 Hilt. 234). By the terms of the contract the building was to be completed in three months and six days. When the notice to stop the work was given, four months and seventeen days had elapsed, and the work was not then sufficiently completed to entitle the plaintiff to the sixth installment. One witness testified that, with a sufficient force of men, such a building could be erected and all completed in three months; and another witness said, that if prosecuted properly and with a sufficient force, four months would be ample; and when asked if it could be done in less, he said that it requires more time in winter, there being more delay in that season on the outside work; and it was shown that \$1,830 was paid for completing the building, which was \$765 more than the amount of the sixth and seventh installments, and that it was not finished until the 1st of May, following. I entertain great doubt from these facts whether the plaintiff proceeded with the work with that diligence which the law requires, yet the evidence is not sufficiently definite to enable us to say positively that the referee erred. There was the positive statement of the plaintiff that he could have finished it by the 15th of February, if the delay in the plastering had not occurred, and that delay may have been very much prolonged by a winter of protracted duration or of great severity, and it was in proof that the weather was very severe. An appellate tribunal would not be justified in assuming any thing not clearly deducible from the evidence which is before it, and should not be unmindful of the consideration that the evidence is rarely, if ever, brought before it in as perfect a form as it was received. We must assume that the referee concluded that the plaintiff would and could have completed the building, under the circumstances, within a reasonable time, if he had not been ordered to discontinue the work. I say we must assume this, as there is no finding upon the point, the twenty-third request of the defendants not being specific enough to embrace it, and we cannot say positively upon the evidence that he erred in so concluding.

In respect to the claim to recoup damages, for deficiencies in the work, it is sufficient to say, that the evidence was conflicting as to the quality of the work and materials, and as to omissions or variances from the contract by the plaintiff, and that the finding of the referee upon that head cannot be reviewed. The conflict did not arise, as suggested, upon the testimony of the plaintiff alone, but he called several experts, each of whom were examined very fully as to the quality of the different materials, and specifically as to the different parts of the workmanship, who united in declaring that both the materials and the workmanship were good; in all respects as good as is usual in houses of the same description.

The subcontractors, Hargrove and Clare, averred that they agreed with the plaintiff to do the plastering work in and about the premises described in the complaint; that they completed the same as far as it was possible, when they were prevented from completing it by the defendants, George E. and Sarah J. K. Williams, and that what they did was worth \$103, and this averment was not controverted by the plaintiff or by any of the defendants. They also proved upon the trial that they did the plastering work upon the building, and each of them was minutely examined upon the trial as to the character of the work and the quality of the materials. The defendant, Heany averred that he put up the marble mantels, under an agreement with the plaintiff, and proved upon the trial that he put up four in the building, which were the same in every respect, as near as he could make them, as those in Mr. Tucker's house, which, by the plaintiff's contract, was the pattern to be followed; that the parlor mantel was \$45, and the other three \$20 each. If the statement of the claims of these subcontractors were defective, which I by no means concede, it would still make no difference, as the Act of 1863 declares that that shall not impair or affect the rights of the claimant, but that they shall have relief according to their rights as they shall appear in evidence, and the evidence was amply sufficient to show that the work done and materials furnished by these subcontractors was in pursuance of the contract made with the plaintiff for the erection of the building, and that is all that is

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requisite under the Act of 1863, which expressly provides, § 1, for liens in favor of persons employed by a contractor or subcontractor. The work done and materials furnished by them being admitted, and the value, their claims were properly found by the referee to be valid liens, prior in point of equity to that of the plaintiff's.

The Act of the 13th of April, 1855, declared that the judgment should direct the sale of the interest of the owner in the land and premises upon which the lien existed, to the extent of the right of the owner at the time of the filing of the notice, and this being a statutory provision, it had to be strictly followed (*Hauptman v. Catlin*, 20 N. Y. 247). This Act and all former Acts are repealed by the Act of 1863, § 12, except so far as it may be necessary to carry into effect liens acquired before the Act of 1863 took effect. The lien here took effect under the Act of 1863, and that Act contains no such provisions as the one referred to in the Act of 1855, but simply provides, § 5, that judgment shall be rendered according to the equity and justice of the claims of the respective parties, and § 9, that it may be enforced by an *execution*, under which the property covered by the lien may be sold, and the proceeds distributed as ordered by such judgment. The lien becomes absolute to the extent of the right, title, and interest which the owner had in the premises at the time when the notice was filed, which interest, according to the provisions of the Act, cannot be divested by any sale or transfer made after the commencement of the work or furnishing of materials. No such sale or transfer exists in this case, the one which was made having been adjudged to have been fraudulent and void, and the decree therefore directs that the premises be sold under execution, and provides for the manner in which the proceeds shall be distributed, which is in strict conformity with the provisions of the Act of 1863.

It remains but to consider the exceptions taken to the admission or to the rejection of testimony. Meehan was asked, if joints filled with putty would be good workmanship. No foundation had been laid for such a question, at least none is pointed out, and I have failed to find any. The referee, therefore, ruled correctly. The inquiry was immaterial.

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The question put to Meehan, whether he could have finished the work by the 15th of February, if the delay in the plastering had not occurred, was admissible, as bearing upon the point, whether Williams and his wife had or had not assented to the delay on that account. The questions put to Hargrove and Clare, as to the cost of hard finish, were immaterial, but the inquiry could in no way prejudice the other defendants, as the work done by Hargrove and Clare, and the value of it, was admitted. The referee awarded therein only the amount claimed and sworn to in their answer, which was not controverted either by the plaintiff or by any of the defendants. The question, whether the plaintiff had a quarrel with Rowe, a real estate broker, and the answer to it, is too trivial for consideration. It could have no material bearing upon the result, whether the question was admitted or rejected, and it was wholly immaterial what answer was or might have been returned to it. The hearing before the referee covered a period of more than three months, and the proceedings in the case embrace over nine hundred printed folios, and to send the case back for another trial we should require some thing more grave than a trivial inquiry like this (*Forrest v. Forrest*, 23 N. Y. Rep. 510). The report of the referee should be affirmed.

JAMES W. MCKEE *and another* v. ISAAC OLIVER *and another*.

The statute is imperative, that when it appears on the trial in a District Court that the defendants are not residents of the city of New York, and that the plaintiffs are residents, but not of the district in which the action was brought, the complaint must be dismissed.

And it does not alter the rule, that the objection of want of jurisdiction was not taken by answer, and only after the plaintiff had rested his case.

APPEAL by the defendants from a judgment rendered in the First District Court.

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The action was brought to recover for services rendered by the plaintiffs, as brokers, in procuring a charter for defendants' vessel. On the return day mentioned in the summons, the defendants answered by general denial. On the trial, it appearing that the plaintiffs did not reside in the district, and that the defendants resided in Baltimore, the defendants moved that the complaint be dismissed for want of jurisdiction. The justice denied the motion, and rendered judgment for the plaintiff, and the defendants appealed to this court.

R. W. Andrews, for appellant.

Alanson Nash, for respondents.

BY THE COURT.—BRADY, J.—By the amendment of the fourth Section of the Act of 1857, in relation to the District Courts of this city, passed in 1862 (Laws of 1862, p. 970, § 20), it is provided that when the action is against the defendant or defendants, not residing in the city and county of New York, it must be brought in the district in which the plaintiff or one of the plaintiffs reside.

It is also provided by the forty-fifth section of the Act of 1857 (Laws of 1857, p. 707), that when it is objected at the trial, and appears by the evidence, that the action is brought in the wrong district, judgment that the action be dismissed with costs, without prejudice to a new action, shall be rendered.

It is not necessary that the objection be taken by answer. It is sufficient that it appears to be warranted by the evidence on the trial, and is then taken. The statute, on such proof and objection, becomes imperative, and the judgment of dismissal must be rendered (*Haulenbeck v. Gillies*, 7 Abb. Rep. 421; *Dean v. Cannon*, 1 Daly Rep. 34).

It having appeared that the defendants were not residents of this city, and that the plaintiffs were residents, but not of the district in which this action was brought, and an objection to the jurisdiction having been taken, the justice had no authority to render the judgment given, and it must be reversed.

Judgment reversed.

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FREDERICK SEYBELL v. THE NATIONAL CURRENCY BANK.

A purchaser in good faith, for a valuable consideration of government securities, transferable by delivery, acquires a title valid against the world, and to constitute want of good faith, there must be knowledge of the want of title in the seller, or the means of knowledge, to which the purchaser willfully shut his eyes (following *Murray v. Lardner*, 2 Wallace, 110).

It will not suffice that there was on the part of the purchaser a want of care and caution, or gross negligence, or a knowledge of circumstances which would excite suspicion in the mind of a prudent man, the rule in respect to *mala fides* being a question of honesty or dishonesty, of the existence of guilty knowledge, or of that willful ignorance which is equivalent to it.

Where the only evidence of *mala fides* on the part of the purchaser (a bank) of stolen government bonds, was that a printed description of the bonds and a notice of their loss by robbery had been left at the bank the day after the loss, it not appearing that such notice was ever seen by the officers of the bank, and also that it was the avowed rule of the bank to disregard such notices,—*Held*, in an action against the bank by the owner of the stolen bonds for their conversion, that it was error to charge the jury that “if the defendants either had, or with reasonable care and attention might have had, notice of the loss, the plaintiff was entitled to recover,” as this was in effect holding that a purchaser of a negotiable government bond, in the usual course of business, for value, acquired no title, if he might, by the exercise of reasonable care and attention, have ascertained that it had been stolen.

The custom of the defendants to disregard printed notices of lost and stolen bonds was properly submitted to the jury as evidence from which bad faith might be inferred; but the defendants should have been permitted to show from the magnitude of their dealings in such securities, and the amount in circulation, and the amount of them lost and stolen, that it was impracticable to keep a record of, or to regard, such notices.

APPEAL by the defendants from a judgment entered at the trial term on the verdict of a jury.

The action was brought for the conversion of two United States bonds, of which the defendants claimed to be purchasers for value and with notice. It appeared on the trial that the plaintiff, on the 12th September, 1865, was the owner and in possession of (with others) two United States bonds, each for one thousand dollars, issued under the Act of July 17, 1861, and numbered respectively, 37,864 and 37,865. On the evening of that day they were stolen from him; he immediately notified the police, caused handbills announcing the robbery to be distributed among the banks and brokers before ten o'clock

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the next morning. He also telegraphed to the Secretary of the Treasury, and advertised the loss in three newspapers. Being informed by the Treasury Department on the 22d September, that the defendants had presented these bonds for conversion on the 19th, he called on them and demanded the bonds, stating that he had sent them a printed notice of the robbery the morning after its occurrence. He was told by the defendants' cashier that "they did not care for the notice." The bonds in question were purchased by the defendants on the 13th September, at a fair market valuation, from whom did not appear. The various exceptions taken at the trial are fully stated in the opinion of the court. The presiding judge charged the jury among other things :

"The theft having been proven, it devolves on the defendants to show that they purchased these bonds, which are payable to bearer, and therefore pass by delivery, giving value for them.

"He claims that immediately upon discovering his loss, and on the same evening that it occurred, he notified the police and caused circulars to be printed, one of which has been produced before you, advising the public of the misfortune, and cautioning them against purchasing the stolen securities ; and he insists that the evidence shows that early on the next morning, and before the usual business hours, some of these circulars had been delivered at the defendants' place of business, by means of which they either had, or with reasonable care and attention might have had, notice of the loss, and if he be correct, then he will be entitled to your verdict.

"Did the notice ever reach the defendants? If it did, and they chose to disregard it, then they are not purchasers in good faith, because if they purchased after notice, or willfully shut their eyes against notice, the law considers the purchase to be made in bad faith. In other words, a purchase after notice implies bad faith.

"If, however, you conclude that the circular was delivered, and that it came to the notice of the defendants, or might have done so but for their own act, and that, notwithstanding that, the defendants saw fit to buy these bonds, then they are not owners of them in good faith, and your verdict must be

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for the plaintiff, because the law does not permit parties to buy and retain stolen property upon the plea that to take notice that it has been stolen would so interrupt their business as to render it impracticable to conduct it."

The jury returned a verdict in favor of the plaintiff for the full value of bonds.

The defendants appealed to general term.

E. More, for appellants.

Though the bonds were stolen from the plaintiff, if defendant was a *bonâ fide* purchaser for value, plaintiff cannot recover (*Swift v. Tyson*, 16 Peters, 1; *Goodman v. Simonds*, 20 How. U. S. 343; *Lardner v. Murray*, 2 Wallace U. S. 110). The case of *Goodman v. Simonds* shows how the ancient rule has been modified in favor of the purchaser, until it is now settled: 1. That the onus is on the assailant to show bad faith. 2. That nothing short of *actual dishonesty* will defeat his title. In *Lardner v. Murray*, the court says that in view of the volume constantly increasing of these securities, in which a large portion of our wealth is invested, while the courts should not so "shape and apply the rule" as to facilitate fraud, "*they should not forget the considerations of equal importance which lie in the other direction.*" The presumption being that we bought in good faith, we claim in this case, that we bought of one who was himself a *bonâ fide* holder. The notice was left in the bank before banking hours. It was error to leave it to the jury to guess whether it came to defendant's notice, or would, but for defendant's fault; as matter of law it was no notice, and it is a question of law (*Birdsall v. Russell*, 29 N. Y. 220).

William R. Stafford, for respondents.

BY THE COURT.—DALY, F. J.—It was held in *Murray v. Lardner* (2 Wallace, 110), that a purchaser in good faith, for a valuable consideration, of government securities, transferable by delivery, acquires a title valid against all the world, and that to constitute want of good faith, there must be knowledge of the want of title; or, as Baron Park said, in *May v.*

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Chapman (16 Mee. & Welsb. 361), the means of knowledge, to which the purchaser willfully shuts his eyes. It will not suffice that there was, on his part, a want of care and caution, or gross negligence, or a knowledge of circumstances which would excite suspicion in the mind of a prudent man, the rule in respect to *mala fides* being a question of honesty or dishonesty; of the existence either of guilty knowledge, or of that willful ignorance which is equivalent to it.

This decision, though not of controlling authority in a State tribunal, is entitled to the greatest weight in view of the circumstances under which it was decided. There had been a previous ruling of the court to the same effect in *Goodman v. Simonds* (20 How. 343), a case which was most elaborately argued, and in which all the authorities bearing upon the subject, either in this country or in England, were reviewed. The ruling of the court in this case was deliberately reconsidered in *Murray v. Lardner*, the leading English authorities were again examined, the reasons which had satisfied the court before were again maturely weighed, and this ruling was sustained by an unanimous decision. A judicial conclusion so deliberately arrived at, by the highest court in the nation, upon a point which affects the whole commercial world, is not only entitled, as I have said, to the greatest weight, but should be regarded as settling the law in this country.

The defendant in the case now before us, is a banking corporation dealing largely, as they offered to show, in government securities. The two bonds, for the conversion of which the action was brought, and which were stolen from the plaintiff, were bought by the defendants in the usual course of business, at a fair market value. The clerk or officer by whom they were purchased had left the bank nine months before the trial, and was, by report, in the State of Iowa. It appeared, however, by the books of the bank, and by the testimony of the cashier, that the two bonds were purchased from the 13th to the 18th of September, 1865; the entries indicating that the purchase was made on the 13th, the day after the robbery. The market rate on that day was between 107 and 108, varying from 107 to 107½ and they were bought at 107½. A purchase like this, by a bank, at their fair market value, and in

the usual course of business, of government bonds which pass by delivery, was conclusive upon the question of good faith, unless the plaintiff could show that the defendants purchased with a knowledge of the robbery, or with the means of knowledge at hand, which they intentionally avoided.

The evidence relied upon to show this was, that a printed handbill announcing the loss and describing the bonds, was, on the morning after the robbery, left before 9 o'clock, on the desk of the cashier of the bank, and on the desk opposite; but it was not shown that the handbill was seen or came to the knowledge of any of the officers or employees of the bank. The plaintiff testified that he called upon the cashier after the 23d of September, and told him that he had sent to the bank a printed notice of the robbery, and that the cashier replied, we don't care for notice, which the cashier in his testimony qualified by saying that he told him that he could not pay attention to notices, or something like that, which he said was true. "We buy and sell," he said, "bonds without any regard to these notices left in the office; we look at notices from time to time, but we keep no record of them; no instructions are given by me to the clerks or officers to bring the notices to me personally." This was all the evidence relied upon to show *mala fides*. It was, to say the least, very slight, and was submitted to the jury by the court, with the instructions that if the defendants either had, or with *reasonable care and attention* might have had, notice of the loss, the plaintiff was entitled to recover, to which the defendant excepted. The exception was well taken, as this was in effect holding that a bank, broker, or other person, who buys a negotiable government bond, in the usual course of business, and pays the fair market value for it, acquires no title if he might by the exercise of reasonable care and attention have ascertained that it had been stolen. A rule like this would make it the duty of the bank to take notice, at their peril, of all printed notices sent to them, of the loss of government bonds, bills, or other negotiable securities in which they dealt, to keep an accurate record of all information of the kind sent to them, and to consult it in every instance, at the risk of liability, before they ventured to pur-

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chase a bond or to discount paper. They would have in fact to institute an inquiry in every case, a rule which as Lord Kenyon said, in *Larson v. Weston* (4 Esp. 56), would paralyze the circulation of all the paper in the country; the defendants offered to show that they dealt largely in government bonds, receiving and paying them out as money; that United States securities, of the description of the two bonds in question, are payable to bearer; that they are bought and sold daily in the market, and are received and paid out by banks, brokers, and bankers, as money; that they pass from hand to hand by delivery, and are always paid for in cash on delivery; that the amount in circulation is very great, and that very large amounts, *several millions*, have been stolen and advertised; that the amount in circulation is so large, the amount stolen or lost so great, and the notices of thefts and losses so frequent, that it would be impossible for the defendants to keep track of those lost or stolen without stopping their business; that notices are constantly thrown in their bank of such thefts or losses, with lists, numbers, and descriptions, and that if they were bound to take notice of all such notices, it would be impracticable to deal in government securities; which offer on their part was excluded. All, in my judgment, that could be legitimately inferred from the omission of the defendants to pay attention to such notices when they purchase negotiable securities of this kind in the regular course of business, and pay the market value for them, would be the want of care and caution, or at best, gross negligence on their part, and this, according to the rule laid down in the two cases before referred to, of *Goodman v. Simonds* and *Murray v. Lardner*, would not be sufficient to destroy their title. Under certain circumstances, gross negligence may be evidence tending to show *mala fides* (*Goodman v. Harvey*, 4 A. and Ellis, 870), and assuming that the habit of the bank to pay no attention to such notices, was evidence from which the jury might infer that the defendants acted in bad faith, then the evidence which they offered, and which the court excluded, should have been received, for it was most material upon the question of a dishonest intent. It was material as showing that their motive was not to facili-

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tate the sale of bonds dishonestly acquired for their own pecuniary benefit, but that they did so because it was impracticable from the magnitude of the amount of such bonds in circulation and the large amount that had been lost or stolen, to do otherwise. If the evidence given was sufficient to submit the question of a want of good faith to the jury, then the defendants were certainly entitled to the benefit of what they offered to show, and for this reason a new trial should be granted.

New trial ordered.

JOHN H. ALBERT v. THE BLEECKER STREET, &c., R. R.
COMPANY.

The plaintiff, an expressman, left his horse standing, untied, in the street, near the curb-stone while he went to deliver a parcel. The driver of defendant's street car, in attempting to pass the wagon to which the horse was attached, came in contact with the wagon. This caused the horse to change his position, and there was some evidence to show that the injury to the horse and wagon was increased by the movements of the horse.

- Held*, 1. That, in the absence of proof of a restive character or vicious propensity of the horse, it was not negligence, *per se*, to leave him in the street untied, under the circumstances.
2. That the fact that the damages were increased by the movement of the horse, after the collision, did not relieve the defendant from liability for negligence in causing the collision.

The loss of the profits of a business which is the proximate consequence of the defendant's negligence, is allowable in estimating the damages. Hence, where the plaintiff's business, as an expressman, was wholly suspended by reason of a fatal injury to his horse, caused by the defendant's negligence, he is entitled to a reasonable time in which to select another horse, and the loss of his profits during that time are allowable as damages. And what is a reasonable time in such a case, is a question for the jury.

APPEAL by the defendant from a judgment of the general term of the Marine Court.

The action was brought to recover damages alleged to have been sustained by reason of a collision between one of the de-

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fendant's cars and the plaintiff's horse and wagon, on the 22d day of June, 1865. The evidence upon the trial developed the following facts :

The plaintiff, an expressman, well acquainted with the locality, knew of the existence of the defendant's railroad, and that the same was in regular and continual operation in and through Crosby street. He had some packages to deliver at Niblo's theatre, and drove close up to the curb-stone in the rear of that building, on the westerly side of Crosby street, and having stopped, he alighted to deliver his packages, leaving his horse untied and unguarded in the street. During the plaintiff's absence from the wagon, a car of defendants approached in the same direction in which the plaintiff's horse was headed, and on nearing the wagon was brought to a full stop at a point eight or ten feet distant from it. The driver of the car, thinking there was room enough to pass, started on again. Coming in contact with the plaintiff's wagon, the horse was hurled upon the curb-stone and against a tree, causing severe injury to the horse and also to the wagon. There was a conflict of evidence as to whether the injury to the horse was not materially increased by his changing his position after the wagon was struck. On the trial, the defendant's counsel asked the court to charge, among other things,

I. That if the jury shall find from the evidence that the plaintiff left his horse untied in a public street, with no one to hold him, such act was negligence on the part of the plaintiff, and he cannot recover in this action.

II. That if the jury shall find from the evidence that the plaintiff's horse changed his position, and that if the horse had remained stationary the accident would not have happened, the plaintiff cannot recover.

III. That if the jury shall find for the plaintiff, the measure of damages is the cost of repairing the injury done, and that loss of business, or loss of service, of which the plaintiff complains, is not to be considered.

The judge refused so to charge, and the defendant's counsel excepted.

On the question of damages, the court allowed the plaintiff

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to show "how long he was kept out of employment by the accident," and "what his business was worth during that time," to which ruling the defendant's counsel excepted.

The jury rendered a verdict for the plaintiff. The defendant appealed.

Robinson & Scribner, for the appellants, on the question of contributory negligence, cited *Button v. Hudson River R. R. Co.* (18 N. Y. 248); *Johnson v. Hudson River R. R. Co.* (20 Id. 65); *Wilds v. Hudson River R. R. Co.* (24 Id. 430, 29 Id. 315); *Mentges v. N. Y. & Harlem R. R. Co.* (1 Hilt. 425); *Halloran v. N. Y. & Harlem R. R. Co.* (2 E. D. Smith, 257); *Morris v. Phelps* (2 Hilt. 38); *Suydam v. Grand street R. R. Co.* (41 Barb. 375; 17 Abb. Pr. 304); *Mangam v. Brooklyn City R. R. Co.* (36 Barb. 237). It was contended that the proper measure of the plaintiff's damages was only the cost of repairing the injury done to the wagon and the expense of curing the horse, in addition to the difference in the value of the property after the accident; citing *Hughes v. Quentin* (8 Carr. & P. 703); *Norman v. Wells* (17 Wend. 161).

E. M. Hussey, for respondent, claimed that the damages necessarily resulting from the accident constituted a proper element of recovery, and cited *Slack v. Brown* (13 Wend. 390); *Strang v. Whitehead* (12 Id. 64); *Bennett v. Lockwood* (20 Id. 223); *Dewint v. Wiltsie* (9 Id. 325).

BY THE COURT.—BRADY, J.—This appeal was argued with great zeal, and it was reserved in consequence of the pertinacity, not censurable, with which defendant's counsel insisted that it was a case of concurring negligence, in the most favorable view for the plaintiff. On the argument, it was considered as presenting a question of fact on the right of the plaintiff to damages, which was fairly submitted to the jury. They were told that if the plaintiff was guilty of any negligence which contributed to the injury complained of, he could not recover. The testimony being conflicting in some respects on that subject, no other instruction could have been given, and the requests of the defendant predicated of a different condition of

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the evidence were properly refused. No questions of law, therefore, require consideration except those which relate to the measure of damages. The measurements made by the plaintiff, and corroborated in part by another witness, proved as he stated, that it was impossible for the car to pass his wagon without striking it. The measurements were shown on a rod to the jury, and their accuracy was not assailed or questioned. From them it appeared that the space between the curb and the rail was six feet, and that the axle-box of the defendant's car extended over the rail nine inches, making the distance between the outer surface of the box and the curb, five feet three inches. I have adopted the most favorable measurement for the defendant. The plaintiff's wagon measured five feet seven inches and a-half, which is four inches and a-half more than the distance between the axle-box and the curb. When the driver of the car saw the wagon, he was satisfied there was not room to pass, and stopped his car, and then, being nearer, saw that there was room to do so. The jury thought his first judgment was the correct one, and such must be the conclusion of every man as long as the measurements given remain uncontradicted. The jury no doubt thought, as we think, that the striking of the wagon caused the horse to change his position, and if such an incident increased the damage in any manner, it only added to the defendant's responsibility. Whether the plaintiff was guilty of negligence was a question of fact for the jury, and was determined by them in his favor. The plaintiff left his horse only to deliver his packages, and this he had a right to do. In the absence of any proof of a restive character, or vicious propensity of the animal, it was not negligence, *per se*, to leave him untied during the brief period employed by the plaintiff in delivering his parcels. So far as the evidence contributes any thing relative to the conduct of the horse, it is, that he remained where he was left until the collision caused, perhaps forced him to change his position. The jury must have so found on the proof. It is true that there is a conflict of evidence as to the cause of the collision, but we cannot interfere with the judgment for that reason. It is sufficient that there is in the case enough to sus-

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tain the verdict. It is also true that the defendant's witnesses state, that when the wagon was replaced on the street, the car passed it, but there is conflict on that subject also. The plaintiff swears that the wheels were then resting on the curb, and the distances already mentioned, show that the thing was impossible. The plaintiff was entitled to recover on the evidence given on his behalf.

The cross examination of the plaintiff showed that he was competent to give evidence of the damage to the wagon and to the horse. The objection to these inquiries was not to the form of the questions, but to the qualification of the witness to speak on the subject. He had owned between forty-five and fifty horses, and had run a stage line in the West, an experience which certainly qualified him to testify. It was evidence which might receive little or no consideration from the jury, but it could not be rejected. It was not necessary, however, to weigh it against other evidence on the subject furnished by the defendants for they gave none. The same reasons apply to the testimony of Hagar. He had been acquainted with the value of horses for twelve years. He had ridden and taken care of horses.

The evidence of loss of earnings was properly admitted. The defendants destroyed for the time being the plaintiff's means of carrying on his trade. It was his duty to replace them within a reasonable time, but the loss sustained *ad interim* was the natural and proximate consequence of the wrong done him, and as such was recoverable (2 Greenleaf's Ev. § 256; *Bennett v. Lockwood*, 20 Wendell, 223; *Shang v. Whitehead*, 12 Wend. 64; *Dewint v. Wiltse*, 9 Wend. 325; *Walrath v. Redfield*, 11 Barb. 368; *Freeman v. Clute*, 3 Barb. 424). In *Bennett v. Lockwood* (*supra*), it was held that a bailor could recover for time spent and expenses incurred in searching for property wrongfully taken by a bailee and it was declared in *Walrath v. Redfield* (*supra*), that the plaintiffs were entitled to recover the value of the use of their mill during the time they were deprived of it by the defendant's act. In *Freeman v. Clute* (*supra*), the contract was for the construction of a steam engine to be used in manufacturing oil, and damages

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were claimed for delay in furnishing it. It was insisted that the damages were to be estimated by ascertaining the amount of business that could be done by the engine, and the profits resulting therefrom. Justice Harris rejected such evidence on process of calculation, but held, nevertheless, that the plaintiff was to be "allowed for the loss of the use of his mill and machinery." I am aware that the case of *Dewint v. Wiltse*, has been criticized in *Blanchard v. Ely* (21 Wend. 342), but the Court of Appeals, in *Griffin v. Colver* (16 N. Y. 489), have commented upon, and I think questioned, *Blanchard v. Ely*, so that it does not stand as an absolute authority upon the subject to which it relates. It was declared in *Griffin v. Colver*, that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. In *Passenger v. Thorburn* (34 N. Y. 634), the defendant sold cabbage seed and warranted the same to produce Bristol cabbages, which warranty was untrue, and it was held that the damages would be the value of a crop of Bristol cabbages such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom. The decision in that case rests upon the ground of fraud in the warranty, an element which it was admitted, in *Blanchard v. Ely*, would have authorized more comprehensive damages, and upon which it was said the decision in the case of *Dewint v. Wiltse* must have been based, and upon which it should be sustained. The rule of damages is analogous in cases of fraud and violence. The question which was asked of the plaintiff in this case was, what was your business worth? It involved no computation or calculation, and was answered promptly. If the horse had been injured only, and under treatment, the proper inquiry would have been the expense of a horse to take his place, but he was injured beyond recovery, and the plaintiff was entitled as already suggested to a reasonable time in which to select another. The time devoted to that involved the necessity of his abandoning his business, and is analogous to the pursuit of the property by the bailor in *Bennett v. Lockwood* (*supra*). The proceeds or

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worth of his business analogous to the use of the mill in *Freeman v. Clute*, (*supra*); and also to the rent for the use of the machinery in *Griffin v. Colver*. The question of damages is to be determined by the facts and circumstances of each case, and it is difficult to find harmonious decisions upon any of the various and complex theories to be found in the books. The difficulty arises from the multiplicity and variety of losses sustained, and their proximate or remote relation as the natural consequences of the injury done. The right of the plaintiff to recover the six dollars per diem is not entirely free from doubt, but it seems to be within the general rule stated, and to be favored by the particular adjudications cited. Whether the twelve days for which the plaintiff asked compensation was an unreasonable period to enable him to reinstate his business, was a question for the jury. It does not seem to be. On a careful examination of this appeal no reason appears why the judgment rendered should be disturbed. The damages awarded do not appear to be excessive. The plaintiff's horse was ruined, and his wagon was so much injured that it was worth little more than it cost to repair it. The plaintiff lost the earnings of twelve days. No evidence to gainsay his testimony on these subjects was given, and the jury awarded him three hundred dollars.

Judgment affirmed.

THE NATIONAL BANK OF BALTIMORE v. JUSTUS R. SACKETT,
and others.

A partner who absconds, under circumstances indicating an intention on his part to abandon the business and leave its control and management to the remaining partners, will be deemed to have consented to an assignment of the firm assets by his partners for the benefit of firm creditors; and an assignment so made will be upheld as against judgment creditors of the firm.

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APPEAL by the plaintiff from an order made at special term, dissolving a preliminary injunction granted heretofore in this action.

The action was brought against the members of the firm of Sackett, Belcher & Co., and their assignees, to set aside an assignment made for the benefit of creditors, as void, and a preliminary injunction was obtained, restraining the defendants from parting with the property of the firm. From the papers used on the motion for the continuance of the injunction, it appeared that previous to June 4, 1866, the firm of Sackett, Belcher & Co. included among its members one William Swanboro. On that day he absconded with a large portion of the assets of the firm, and had never since been heard from, nor had the remaining members been able to communicate with him. He never had any capital in the firm, but on the contrary, was largely indebted thereto. The remaining members gave notice immediately, by publication, that Swanboro was no longer a member of the firm, and that the business would be conducted by them. On the 8th of October, 1866, the remaining members assigned the partnership property to the defendants Britton & Gerard, in trust for the payment of the firm's debts. The assignment was executed as the act and deed of the firm, and is signed individually and executed individually by every member of the firm, except Swanboro.

The motion for a continuance of the injunction was denied and the injunction dissolved with the following opinion :

CARDOZO, J.—I understand the following propositions to be fairly deducible from the authorities :

1. That an assignment of all the property of an insolvent partnership may be valid, although not executed by all the partners, if authority in the partners executing it has either been expressly granted or may be inferred from circumstances (*Welles v. March*, 30 N. Y. 330; *Kelly v. Baker*, 2 Hilt. 531; *Roberts v. Chollar*, Genl. T. Com. Pleas, April, 1866). ^{supra} 110
2. That such an assignment cannot be sustained where the non-executing partner is present, see cases collected in *Palmer*

v. *Myers* (43 Barb. 549), and also *Wetter v. Schliefer* (4 E. D. Smith, 707). n/

3. That mere absence, unaccompanied by any other circumstance, will not imply a power on the partners present to execute such an assignment (*Robinson v. Gregory*, Court of Appeals, Dec. 1864, cited in *Welles v. March*, *supra*).

4. That fraudulently absconding from the country, leaving a letter authorizing the remaining partners to close up the business, and stating that the interests of the absconder was thereby assigned to them, gives power to them to make a general assignment of the partnership effects (*Welles v. March*, *supra*, *Kelly v. Baker*, *supra*), and also, that such a fraudulent absconding alone, without leaving any communication, has the like effect, and amounts to an abandonment of the management and disposition of the joint property (*Palmer v. Myers*, *supra*).

I should therefore have no difficulty in deciding the question now presented, except for the decision of this court in *Adams v. Houghton* (3 Abb. Pr. N. S. 46), from which I dissented, in which it was held that as the statute of 1860, respecting assignments, required that they should be acknowledged by the assignors (*Cook v. Kelly*, 14 Abb. 466), an assignment could not be executed by an attorney in fact, in the name and on behalf of his principal. But after careful consideration, I have concluded that, giving full effect to that decision, as of course I should and would do, it does not apply to the present case. It should, I think, be applied, and only extends to such assignments as cannot be upheld unless executed by all the partners—as in the case of all of them being here, or of mere absence of one of them.

In other words, it relates to the form and manner in which the assignment must be executed by those who are necessary parties to it, but does not affect the question of who those necessary parties are. But the question here is, who are necessary parties to the instrument, and in this and similar cases I think the assignment does not need to be executed by or in the name of the absconder, and is good and effectual, though executed by the parties remaining in charge of the business. If

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the absconding of a partner only had the effect to give, by implication, a power to his copartners to act in *his* name, I should be of opinion, that as the general term had held that an express power was not sufficient to uphold an insolvent assignment, an implied one certainly could not be, and it would present a case where, owing to the misconduct of one of the partners, the firm would be deprived of an advantage which it ordinarily would possess. But the effect of absconding, as will be found by a careful examination of the cases above mentioned, is, and I think should be extended. It is to vest in those who remain the right to control and dispose of the property in their names, the same as if the absconding partner had no further interest in it. Their act, though not done in his name, binds him; and an assignment executed by them effectually passes the title of the property of the partnership, although his name is not affixed to it, as if signed by an attorney in fact or otherwise. The abandonment authorizes the remaining partners to execute the assignment, and thus executed, it conveys, if the language cover it, the whole partnership property.

If these views be correct, the assignment, as executed in this case, passed the whole partnership property, and having been duly personally acknowledged by all the parties whose concurrence was necessary under the circumstances to transfer the title, it is not amenable to any objection of the character covered by the decision in *Adams v. Houghton*.

The other point relied upon does not seem to me to require any especial remark.

The injunction should be dissolved.

The plaintiffs appealed to the general term.

Fithian, Clark & Smith, for appellants, cited *Robinson v. Gregory* (Court of Appeals, Dec. Term, 1863); *Welles v. March* (30 N. Y. 344); *Haggerty v. Granger* (15 How. Pr. 244); *Wethe v. Schliefer* (15 How. Pr. 268); *Hitchcock v. St. John* (1 Hoff. Ch. R. 511); *Pettit v. Oreen* (6 Bosw. 123); *Denning v. Colt* (3 Sandf. 284); *Cook v. Kelly* (14 Abb. Pr. 466); *Adams v. Houghton* (3 Abb. Pr. N. S. 46).

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W. J. Osborn, for respondents Sackett *et al.*

Thomas C. T. Buckley, for respondents Britton & Gerard.

I. While it is entirely true that when all the partners are present, all must unite in an assignment, and that since the Act of 1860, all must personally acknowledge the instrument they are required to unite in, yet those decisions have no application to a case of *absconding* by one of the partners.

By such an act, for all purposes of disposition of the firm property, *he ceases to possess any rights*; the remaining partners are considered in law as the owners, and the only necessary parties to execute or acknowledge the assignment (*Palmer v. Myers*, 43 Barb. 512, citing and commenting on *Wells v. March*, 30 N. Y. 344; see *Kelly v. Baker*, 2 Hilt. 531).

II. If Swansboro was not a necessary party to the assignment in the sense that the remaining partners could not transfer the property without him by an assignment executed by them in the firm name, the statute of 1860 is fully complied with, and this case is not within the decision in *Adams v. Houghton*.

BY THE COURT.—DALY, F. J.—The point involved in this case has been decided by the general term of the Supreme Court of this district in *Palmer v. Myers* (43 Barb. 509), and was, I think, decided correctly.

The decision of the Court of Appeals in reversing *Robinson v. Gregory* (29 Barb. 560), is not reported; but from what is said respecting that judgment by Justice Wright in *Welles v. March* (30 N. Y. 350), it was a very different case from *Palmer v. Myers*, or the one now before us. The partner who had not joined in the assignment in that case, had not absconded, but was simply absent when the resident partner here executed the assignment, and Justice Wright, in referring to the facts in that case, says that the absent partner had never, in writing or verbally, assented to the assignment, but on the contrary dissented. Justice Roosevelt, who gave the opinion of the Supreme Court, says that he executed a power of attorney to one of his copartners, which, says the justice, "inter-

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preted by the light of surrounding circumstances, was clearly intended to meet every possible emergency." The Court of Appeals, as may be inferred from the statement of Justice Wright, evidently thought otherwise, and did not regard it as conferring any authority to make for him a general assignment of all the funds and effects of the partnership to a trustee for the payment of debts.

In the subsequent case of *Welles v. March, supra*, the Court of Appeals upheld the validity of an assignment by one partner where the other had absconded, leaving behind him a letter, clearly conferring authority upon the remaining partner to make such an assignment. It may be extracted from this decision, and that of the Supreme Court in *Palmer v. Myers, supra*, that the authority of each partner is limited to transactions within the scope and object of the partnership; that a general assignment of all the partnership effects to a trustee for the benefit of creditors, is the exercise of a power, without the scope and object of the partnership enterprise, being a suspension and dissolution of it; that no such power can be implied from the partnership relation, and consequently where it is exercised without the consent or authority of one of the copartners, the assignment is void, and passes no title; but that such a consent and authority is necessarily implied where the partner absconds, under circumstances indicating clearly an intention on his part to abandon the business to the remaining partners, and leave the exclusive control and management of it entirely thereafter to them.

In this present case, the partner absconded, taking with him a large portion of the assets of the firm, in which, in fact, he had no capital, but to which, he was, at the time, indebted; and he has never since been heard from. By this wrongful and dishonest act, he himself put an end to the firm, and the act was one clearly implying his consent to the disposition which his partners subsequently made of the remaining effects for the benefit of creditors.

The order dissolving the injunction should be affirmed.

Order affirmed.

Jay v. The Long Island Railroad Company.

WILLIAM JAY v. THE LONG ISLAND R. R. COMPANY.

A married woman may execute a valid assignment of a cause of action, relating to her separate property, without the joining of her husband; and this, notwithstanding she derived the property through her husband.

An action may be maintained, in a District Court of the city of New York, against a corporation which has any place for the transaction of business in that city. It is not necessary that its general business should be transacted within the city; nor is it necessary that it should be sued in the district in which its general business is transacted. It may be sued in any district in which it has a place of business.

The provision of section 28 of the act of 1862 (Laws of 1862, 970), that "no person, who shall have a place of business in the city of New York, shall be deemed to be a nonresident," &c., includes corporations. Hence, a corporation, having any place of business in the city, must be sued by long summons.

An objection to jurisdiction, in a District Court, must be taken at the trial, or it will be deemed to have been waived.

APPEAL by the defendants from a judgment rendered in a District Court.

The facts sufficiently appear in the opinion of the Court.

S. B. Noble, for appellants.

Flamen B. Chandler, for respondent.

BY THE COURT.—BRADY, J.—Mary F. Butterworth, in July, 1863, in company with her husband, took the morning train on the defendants' road, from Syossett, for Hunter's Point. They had some trunks, and a box, which contained lace. The box was handed to a man in the baggage car, and a check for it requested, but he said that it could not be given, as the checks had been left at Hunter's Point. The box was not safely carried, and this action was brought to recover the value of the contents. It appeared on the trial that the lace belonged to Mrs. Butterworth, but whether by gift from her husband or purchase from her own funds or estate, or both, was left in doubt. It also appeared that the claim had been assigned to the plaintiff,

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because Mrs. Butterworth did not wish to be a witness, but, nevertheless, that the assignment was absolute and unconditional. The only evidence on that subject was that given by the plaintiff, who was called by the defendants, and who stated, unqualifiedly, that he owned the claim, and that no understanding or reservation was made to the contrary, when the claim was assigned. It did not appear that the plaintiff did not reside in the district in which the action was brought, or that the defendants had a place of business or office in which its *general business* was transacted, but it did appear that the President of the Long Island Railroad Company had been personally served with the summons, and that the defendants had an office in this city, for the sale of tickets and for checking baggage. The point most elaborately discussed, on the part of the appellants, is that the defendants could not be sued in a District Court, because they had no office in this city for the transaction of their general business, and no part of their track was laid in it. The answers to these propositions may be briefly stated. The objection to the jurisdiction does not appear to have been distinctly taken at the trial, and is waived (Laws of 1857, in relation to District Courts, 1 vol. p. 707, § 45). That is not, however, important, because if it had been, it would not have availed the defendants. Section 4, subdivision 2, of the act mentioned, provides that if the defendant be a corporation created by law, the action is to be brought in a court held in the district in which the plaintiff resides, *or* the defendant transacts its general business, *or* keeps an office, *or* has an agency established for the transaction of business. It must be assumed, in the absence of proof to the contrary, that the plaintiff resided in the district in which this action was brought, and that gave the justice jurisdiction. The plaintiff may bring his action either in the district in which he resides, *or* the defendant being a corporation, in one in which it transacts its general business, *or* has an agency established for the transaction of business, *or* keeps an office. The limit is not to a district in which the general business is transacted. It is enough that there is an agency for the transaction of business, *or* that the defendant keeps an office. The defendants in this action kept an office, and might have been sued in the district in

which such office was located. This refutes the argument that a corporation cannot be sued in a District Court, unless its general business is transacted within the city of New York. The statute expressly confers jurisdiction, as we have seen, although such is not the case. The appellants also present the point that they were sued by a summons returnable in more than four days from its date; that they should have been sued in accordance with the provisions of section 13 of the act mentioned, as non-residents. The answer to that objection is, that the amendment to the act of 1857, *supra*, passed in 1862 (Laws, p. 970, § 23), provides that, "no person who shall have a place of business in the city of New York, shall be deemed to be a nonresident, under the provisions of this act," and that by the 80th section of the act of 1857, the word person, when employed, includes a corporation, as well as a natural person. It is not necessary that the defendants should, under the provisions of these sections, have a place where their general business is transacted. It is sufficient if, in the language of the statute, they have a place of business. Whatever would be sufficient to place a natural person within the purview of the statute, must be enough to include a corporation, when a defendant. Keeping an office by an individual for the sale of any thing connected with his business, would, beyond all doubt, for the purposes of these sections, make it a place of business. These conclusions dispose of the questions relating to the jurisdiction of the justice before whom the case was tried, both under the provisions of section 45, *supra*, and the other sections of the act of 1857, and amendments referred to. It is said, however, that the property belonged to the husband of the assignor, who did not unite in the assignment. Prior to the statute of 1862 (Laws, p. 343) it is extremely doubtful whether the plaintiff could have maintained this action on the individual assignment of Mrs. Butterworth, but now there can be no doubt that he was the lawful owner of the claim by assignment from Mrs. Butterworth. The act of 1860 (Laws, p. 158), by the 7th section, provided that any woman, while married, might sue and be sued in all matters relating to her separate estate, which might thereafter come to her by descent, devise, bequest, or gift of any person, *except her husband*, in the

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same manner as if she were single. The Legislature, in 1862, (Laws, § 3), amended the 7th section of the laws of 1860, by striking out the words, "except her husband," and vested her, thereby, with the right to sue, in relation to her property, by gift of any person, and consequently by gift from her husband. We must assume that by striking out of the section the words mentioned, it was intended that property by gift from the husband was to be regarded, legally, as if given by a stranger. Mrs. Butterworth having the right to sue, she could, under the provisions of the same acts, dispose of her claim. The plaintiff was, therefore, the owner of the demand sought to be enforced. The evidence does not sustain the conclusion that the assignment was not intended to convey the assignor's interest, as already suggested. The finding of the justice cannot be said to be unsupported by proof, and there is no conflict on the subject. The judgment, for these reasons, should be affirmed.

Judgment affirmed. .

ADAM WEBER v. HORATIO N. FERRIS, *and others.*

The sheriff, under an indemnity from a subsequent execution creditor, and at his instance, sold property upon which he had previously formally levied under a prior execution, in favor of another creditor against the same defendant. The sheriff applied the whole proceeds of the sale to the satisfaction of the prior execution.

Held, That the subsequent creditor, as the indemnitor and director of the sheriff, was liable, in an action by the owner of the property sold, as an original trespasser, and that the fact that the proceeds of the trespass went to satisfy the first execution, did not tend to mitigate the damages.

APPEAL by the defendants from a judgment entered on the report of a referee.

The defendants in the action had judgment and execution against the plaintiffs' vendor, upon which they indemnified the sheriff, who thereupon sold out all of the plaintiff's proper-

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ty, and applied part of the proceeds to a prior execution, under which formal levy had been made.

The action was brought and tried before a referee for damages, who found as a fact, that the plaintiff's purchase from the defendant in the executions was *bonâ fide*, and that he was the owner of the property seized and sold, and gave judgment for the plaintiff, from which judgment the defendants appealed to the General Term.

S. B. Cushing, for appellants.

Charles Fraser, for respondent.

BY THE COURT.—BARRETT, J.—This appeal presents no questions of law, and after a careful review of the case, we find ample evidence to sustain the Referee's findings of fact.

The defendants as indemnitors and directors of the sheriff, are liable as original trespassers (*Herring v. Hoppock*, 15 N. Y. R. 409; *Ponda v. Van Horn*, 15 Wend. 632; *Davis v. Newkirk*, 5 Den. 92; *Root v. Chandler*, 10 Wend. 110; *Allen v. Crary*, 10 Wend. 349). There is nothing in the point that the goods had been previously levied upon under a prior execution. That was a mere formal and technical levy, which the officer would not have pressed, without an indemnity. It was made in the ordinary routine of duty, without instructions from the plaintiff in the execution. The seizure and sale of the goods, and their consequent loss to the plaintiff, resulted from the special instructions, and indemnity given upon their execution, by the present defendants. The application of the proceeds of the trespass was immaterial and the fact that they went to satisfy the first execution, did not tend to mitigate the damages. The trespass consisted in the seizure of all the property, and the defendants, as directors and indemnitors, are liable for its full value. If they were unwilling to assume so great a responsibility, the particular part of the property upon which a levy was to be risked should have been pointed out and separated.

The judgment should be affirmed.

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ROBERT WERNER v. THE GERMAN SAVINGS BANK.

A statute which is inconsistent with some of the provisions of a former statute, impliedly repeals the latter, so far as the provisions are incompatible with each other, leaving the former law in full force and effect in all other respects. Subsequently to the passage of the General Statute of 1853 (Laws of 1853, ch. 257), which requires that all savings banks, then or thereafter to be created in the counties of New York and Kings, shall pay interest on deposits, at the rate of one per cent. per annum greater on sums of \$500 and under, than on sums exceeding \$500, the act incorporating the defendant as a savings bank was passed. By the latter act, the defendant's trustees, were required to regulate the rate of interest to be allowed to all depositors without distinction, so that the latter should receive a ratable proportion of all the profits of the defendant's business, and provision was made for the distribution of surplus moneys, from time to time, among depositors. The defendant's trustees, having fixed the rate of interest on all deposits at 5 per cent., the plaintiff, a depositor of \$250, sues to recover an additional one per cent., interest, upon that amount.

Held, on demurrer to the complaint, that he could not recover.

APPEAL by the plaintiff from a judgment of the Fourth District Court upon demurrer.

The action was brought to recover of the defendants the sum of three dollars and seventy-five cents, for three months interest on two hundred and fifty dollars, at the rate of six per cent. per annum.

The complaint alleged that by the fifth section of the "Act in relation to savings banks, or institutions for savings, in the city and county of New York, and the county of Kings," passed April 15, 1853 (Session Laws, ch. 257, page 550), the rate of interest on all deposits of \$500 and under was required to be one per cent. per annum greater than that allowed on any sum exceeding \$500. The complaint also alleged that the defendant was a savings institution duly incorporated by an act of the Legislature of the State of New York, passed April 9, 1859, entitled "An act to incorporate the German Savings Bank, in the City of New York"; that the plaintiff deposited with the defendant the sum of \$250; that he had demanded the amount claimed, being six per cent. per annum interest on

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that amount for three months ; that the defendant allowed five per cent. per annum interest on deposits exceeding \$500. The complaint also alleged that the Bank Superintendent of the State of New York had decided upon the question of defendant's liability, which decision was contained in two communications from that officer, and annexed to and made a part of the complaint ; that the defendant had many thousand dollars of surplus funds, and much more than enough to pay all arrearages of interest to depositors of \$500 and under.

The defendants demurred to the complaint on the ground that, if taken as true, it did not state facts sufficient to constitute a cause of action.

Judgment for the defendants on the demurrer with costs, unless the plaintiff amend his complaint so as to show a cause of action against the defendants.

The plaintiff appealed to this Court.

Stallknecht & Hall, for appellant, cited *Bowen v. Lease* (5 Hill 225) ; *People v. Deming* (1 Hilt. 271) ; *Mayor, &c. v. Walker* (4 E. D. Smith 258) ; *McCartee v. Orphan Asylum Society* (9 Cow. 507) ; *Hayes v. Symonds* (9 Barb. 260) ; *Harrington v. Rochester* (10 Wend. 547).

M. V. B. Wilcoxson, for respondent.

BY THE COURT.—BRADY, J.—The act of the legislature passed April 15, 1853 (Laws 1853, p. 550), is general. It is "relative to savings banks, or institutions for savings, in the city and county of New York, and the county of Kings," and by its terms applies as well to banks chartered when it was passed, as to banks which might be chartered. It does not follow, however, that it is controlling upon the defendants. They were incorporated by an act passed in 1859 (Laws, p. 469), which contains provisions upon the same subject embraced in the general act which are incompatible with it ; and, according to well-settled rules, a subsequent statute making a different provision on the same subject, is not to be construed as explanatory but as an implied repeal of the former. If the subsequent act is inconsistent with some of the provisions only of the former or

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pre-existing law, it is an implied repeal of the first, so far as the provisions are incompatible with each other, leaving the original law in full force and effect in all other respects. This is more particularly so, if it appears that it was intended that the latter statute should govern in the case provided for (*Dash v. Van Kleeck*, 7 Johns. 477, 479; *Columbian Manufacturing Co. v. Vanderpoel*, 4 Cow. 556; *Livingston v. Harris*, 11 Wend. 329; *Deater & Limerick Plank Road Co. v. Allen*, 16 Barb. 15; *Davis v. Fairbanks*, 3 How. U. S. Rep. 636). A comparison of the acts mentioned will show that the act incorporating the defendants contains provisions inconsistent with the other, a general act, and that the legislature have in it expressed a particular intention incompatible with the general intention, which even if the intentions were contained in the same act would create an exception (Sedgwick on Statutory Law, 423). By the fifth section of the general act no bank is permitted to receive from any individual depositor a larger sum than \$1000, nor a larger amount than three millions of dollars in the aggregate amount of deposits exclusive of its banking house; and the rate of interest on all deposits of five hundred dollars and under shall be one per cent. per annum greater than shall be allowed on any sum exceeding \$500. By the sixth section of the act incorporating the defendants, their general business is declared to be, to receive on deposit such sums of money as may be from time to time offered, and to invest the same in the manner prescribed, for the use, interest and advantage of the depositors and their legal representatives, and it is also provided that the defendants shall receive on deposit all sums of money which may be offered; for the purpose of being invested as aforesaid, but not to exceed the sum of \$5000, from any one individual. It is also provided that no officer or servant of the defendants, shall directly or indirectly borrow, or in any manner use its funds, or deposits, except to pay current expenses. It is also provided that it shall be the duty of the trustees of the defendants to regulate the interest to be allowed to the depositors, so that they shall receive as nearly as may be a ratable proportion of all the profits of the corporation, after deducting expenses. By the fourteenth section, the corporation created, it

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is declared, shall be subject to the provisions of the eighteenth chapter, of the first part of the revised statutes as far as the same may be applicable. The act of incorporation will be found on examination to contain provisions bearing upon the duties of the trustees; the prohibition of their receiving any pay or emolument, for their services; the manner of filling vacancies in their number caused by death, resignation or otherwise; the manner of investing funds, and making loans upon real estate, and among others, the provision that whenever it shall appear that there is an excess of \$25,000, in possession of the corporation, after the payment of the usual interest to the depositors, that sum shall be invested for the security of the depositors in said corporation, and thereafter at each annual examination of the affairs of said corporation any surplus over and above said sum, shall, in addition to the usual interest, be divided ratably amongst the depositors, in such manner as the board of managers shall direct. These provisions show that the defendants are a *quasi* benevolent institution, the earnings of which are to be distributed to the depositors, for whose benefit every thing gained seems to be disposed. The trustees are not to receive any compensation; no officer can borrow or use its funds; and when there is surplus of \$25,000, above the interest paid, it is to be invested for the security of the depositors, and all subsequent excess over that sum is, besides the usual interest, to be divided ratably amongst the depositors. There is no limit either to the amount of deposits that may be received, in which respect it differs from the provisions of the general act limiting the amount to \$3,000,000. Enough has been stated to prove that there are important and essential differences between the acts mentioned, which are incompatible with each other, and which demonstrate the intention of the law-makers to create a bank, which should be governed by the laws declared in the act of incorporation. That intention is, however, further established by the fact that the fourteenth section of that act declares the provisions of the statutes to which the defendants should be subject, and of which the act of 1853 is not one. The general design and mode of government being thus considered, it is apparent on general principles that the defend-

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ants are not subject to the payment of any interest beyond that which they have by regulation prescribed, and that the one per centum. additional interest granted to depositors of \$500 and under in savings banks, referred to in the act of 1853, cannot be recovered of the defendants. Independently of this, however, it can be shown that the legislature, by the act incorporating the defendants, have provided by independent legislation for the interest to be paid to the depositors in the defendants' institution, and for additional compensation to such depositors. Under the act of 1853 no discretion is vested in the bank as to the interest on deposits of \$500 and under. The law declares that as to such sums it shall be one per cent. per annum greater than allowed on any sum exceeding \$500. The depositors of such sums, however, are not entitled to any thing more than the interest mentioned and one per cent. additional. The object of that provision seems to be to induce small deposits, and to encourage accumulations in that way, which would result in pecuniary advantage to the banks. The defendants are required, however, to regulate the rate of interest to be allowed to the depositors, so that they shall receive, as nearly as may be, a ratable proportion of all the profits of the corporation, after deducting all necessary expenses. The interest is to be allowed to *all* the depositors without distinction, in a ratable proportion to the profits. It is based on profits of which the depositors are to receive in interest, as nearly as may be, a ratable proportion. The proportion is not declared by statute in rates. That is left to the trustees to regulate, and they have not declared that the depositors of sums of \$500 and under shall receive one per cent. more than depositors of a greater sum than that named. It is alleged in the complaint, it is true, that five per cent. interest was allowed by the defendants on sums of more than \$500, and it may be that the rate of interest mentioned is regulated, as required by statute, so that the depositors shall receive, as nearly as may be, a ratable proportion of the profits. It is not important, so far as the decision of this appeal is concerned, whether that be so or not. It is enough that the rate of interest is to be regulated by the trustees, to dispose of any claim to the interest given by the statute of 1853 to banks

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referred to in it, and not excepted by law. We find, further, when the defendants have an excess of \$25,000 in possession, after the payment of the usual interest to the depositors, that sum shall be invested for their security, and thereafter, at each annual examination of the affairs of the defendants, any surplus over and above that sum shall, in addition to the usual interest, be divided ratably among the depositors, in such manner as the board of managers shall direct. This provision gives the increase of interest to depositors by a distribution of surplus, or a profit on their deposits in addition to interest, and is the only additional gain to which they are entitled. To hold that any class of depositors should have, under the peculiar organization of the defendants' corporation, any advantage other than that arising from superior credits or deposits, would be in violation of the plain intent of the legislature. The only benefit to be derived from deposits in the defendants' bank is that secured by regulations which its trustees may establish, and the distribution of the surplus that may exist, in accordance with the law of their incorporation. The decision of the justice, for these reasons, was correct, and the judgment should be affirmed.

Judgment affirmed.

Greene v. Gonzales.

JAMES H. GREENE v. R. GONZALES.

To warrant the issuing of an attachment out of a District Court, it is not sufficient that the statements of the affidavit, upon which the attachment is asked, are made on information derived from a person not named, and not under oath, without any explanation of the reason why the affidavit of such person is not procured, or more reliable testimony obtained.

Information derived from third parties may be sufficient, where the source and nature of the information are set forth with such particularity and certainty, that the defendant can easily contradict it if it is untrue, and the plaintiff's inability to procure their affidavits is shown.

The declaration or statement of an agent is received as evidence against the principal only where it constitutes part of the *res gesta* in some transaction where he acts for his principal, and where it is in the nature of original, and not hearsay, evidence.

APPEAL by the defendant from a judgment of the Sixth District Court.

The action was brought for services rendered in painting a dwelling-house at the request of the defendant, and was commenced by attachment, on the return of which, the defendant, by counsel, appeared solely to object, and moved to vacate the attachment upon the ground, amongst others, that the affidavit upon which it was issued was insufficient. The allegations of the affidavit appear in the opinion of the Court. The motion was denied, and judgment was rendered for the plaintiff, from which the defendant appealed to this Court.

Jas. M. Sheehan, for appellant.

Everett P. Wheeler, for respondent.

BY THE COURT.—DALY, F. J.—The affidavit upon which the warrant was granted was not sufficient. The only facts positively sworn to are these: the existence of the debt; that the plaintiff was induced to make the contract by a representation of the defendant which is not stated to have been untrue; that the defendant was frequently requested to pay it, but put off the plaintiff "by various excuses"; and, that the business

of the defendant is that of buying and selling pianos. This is all, as I have said, which is positively sworn to. The residue of the affidavit is upon information and belief. It is information received by the plaintiff from a person in charge of property belonging to the defendant, to the effect, that the defendant was selling off his pianos at cost, as fast as he could, and was not buying others with the money; that he was about removing from the county with the pianos that remained; that he had threatened to kill any one who should hinder him from removing them; and that he was spending the money he received by the sale of the pianos upon a woman, not his wife, with whom he cohabited.

If what is here stated had been brought to the knowledge of the justice by competent evidence, it would be sufficient, presumptively, to warrant the conclusion that the defendant had done, or was about to do, one or more of the acts for which, under the statute (Laws of 1831, p. 402, § 34), an attachment may be granted; but it is given in the affidavit as information derived from a person not named, and who was not under oath, without any explanation of the reason why his affidavit was not procured, or more reliable testimony than hearsay obtained; which is not sufficient to authorize the arrest of a man as a fraudulent debtor (*Broadhead v. McConnell*, 3 Barb. 191; *Stewart v. Brown*, 16 *Id.* 367; *Smith v. Luce*, 14 Wend. 238; *Ex parte Haynes*, 18 *Id.* 615; *Tallman v. Bigelow*, 10 *Id.* 420; *Smith v. Weed*, 20 *Id.* 184; *People v. Recorder of Albany*, 6 Hill, 429; *St. Amant v. De Beiseidon*, 3 Sandf. 703).

Information derived from third persons, given in reply to inquiries made at a party's residence, may be received as evidence to show his absence, in the case of a subscribing witness, or of an absconding debtor, as an exception to the general rule which excludes hearsay (1 Greenleaf's Ev. §§ 101, 574; *Morgan v. Avery*, 7 Barb. 656); and it may be that information derived from third parties will suffice in the affidavit for an attachment under the nonimprisonment act, where the source and the nature of the information upon which the plaintiff founds his belief of a fraudulent intent, are set forth with such particularity

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and certainty, that the defendant can easily, if it is untrue, controvert it; but even then, to warrant the reception of such testimony, it would have to be shown that the affidavit of the person from whom it was derived could not, from the peculiar circumstances of the case, be obtained (*St. Amant v. De Beisceidon, supra*). The words of the statute are that "the warrant may be granted, when it shall satisfactorily appear to such justice" that the defendant has done, or is about to do, any of the acts specified in the statute; and "the justice must be so satisfied," says Savage, C. J., in *Smith v. Luce, supra*, "from proof of facts and circumstances." Here there was nothing but the plaintiff's belief, founded upon what was told him by a person in charge of the defendant's property. This person may have been the defendant's agent, but that would not make what he told the plaintiff evidence. The declaration or statement of an agent is received as evidence against the principal only where it constitutes part of the *res gestæ* in some transaction where he acts for his principal, and where it is in the nature of original and not of hearsay evidence (*Luby v. Hudson River Railroad Co.* 17 N. Y. 133; *Thalimer v. Brinkerhoff*, 20 John. 397). Thus, in the case first above cited, it was held to be erroneous to allow a policeman to testify that the driver of a car told him, as he arrested him upon his getting off the car, after an accident, that he could not stop the car, as the brake was out of order. If the statement of the defendant's driver here was deemed incompetent, certainly a statement like the one embodied in the plaintiff's affidavit was equally incompetent to authorize the arrest of the defendant upon an attachment. The judgment should, therefore, be reversed.

Judgment reversed.

SUSKIND STERN v. THE CONGREGATION SCHAARE RACHMIN.

To defeat a recovery by a servant, for services offered to be performed by him under an unexpired contract of employment, on the ground of his discharge by the master, the latter must establish affirmatively that the discharge was for just cause. A mere admission by the plaintiff upon the trial that his discharge was for "alleged cause," has not the force of present proof of facts from which a sufficient cause may be inferred.

At a general meeting of the members of a religious society, the plaintiff was elected sexton for one year, at a fixed annual salary, and entered upon his duties. At a meeting of the board of trustees resolutions were afterward passed discharging the plaintiff for "alleged cause," and he was also expelled from membership with the congregation: *Held*, that it not appearing that membership was a prerequisite to the position of sexton, his expulsion did not affect his legal rights, under the contract of employment as sexton.

APPEAL by the plaintiff from a judgment of the Fourth District Court.

The action was brought to recover for services rendered by the plaintiff, as the sexton of the defendant. It was admitted on the trial, that the defendant was a duly incorporated religious society; that the plaintiff was elected sexton of the society at a general meeting of the congregation, in April, 1864, for one year, to commence from May 1, 1864, at an annual salary, payable quarterly; this salary had been paid up to February 1, 1865. In January, 1865, at a regular meeting of the board of trustees, it was resolved to discharge the plaintiff from his employment, and he was so discharged by the trustees, although plaintiff did not consent to such discharge, and was ready to perform the services for which he was employed. The plaintiff was a member of the congregation, and on the charges made against him, which caused his discharge as sexton, he was expelled from his membership of the congregation, on or about May 28, 1865. Judgment was rendered for the defendants, and the plaintiff appealed to this court.

A. A. Phillips, for appellant.

P. J. Joachimsen, for respondents.

Stern v. The Congregation Schaare Rachmin.

BARRETT, J.—Upon the statement of facts presented to the court below, the plaintiff was entitled to judgment. By a contract, the validity of which is not questioned, he was employed as the defendant's sexton for one year, at a fixed compensation. He was discharged, and for aught that appears, unjustly, before his term of service had expired. The contract itself, together with performance on the plaintiff's part until discharged, and his readiness and willingness thereafter, being admitted facts, it was incumbent upon the defendant to establish affirmatively the propriety and justice of the discharge. Nothing of the kind appears in the return. The statement that he was discharged "for alleged cause" is wholly insufficient. What was required was an admission, which should have the force of present proof, and not a mere past allegation based upon the defendant's own conclusions from undisclosed facts. This defect of proof is not cured by the further admission of the plaintiff's expulsion from membership in the congregation for the same "alleged cause." In the absence of the facts upon which the charges were founded, the plaintiff's innocence can alone be assumed; and the expulsion may have been an additional act of injustice. Besides, it nowhere appears that membership was a prerequisite to holding the position of sexton, and the plaintiff may have been a bad member, and yet a faithful servant of the society. His failure, for instance, to perform the religious duties imposed upon the members is not inconsistent with the strict performance of his legal obligations under the contract; and yet the former may have been the sole cause of his expulsion.

It was, therefore, immaterial whether the discharge emanated from the trustees, or from the society at large. In either case, it was, upon the facts before us, without justification. The question of the authority of the trustees, in any case, to discharge a sexton elected by the whole body, does not, therefore, arise.

The judgment should be reversed.

DALY, F. J.—I agree in the conclusion to which Judge Barrett has arrived.

A sexton, says Burns, is the keeper of the holy things belonging to the divine worship (3 Burns' Ecc. Law, 342, 6 Lond. ed.) With us, he is a person who has the care of a house of public worship, and who discharges certain duties connected therewith, which differ more or less, according to the requirements or practice of the religious sect to which the congregation belongs for whom he acts. From the very nature of his duties he is one who should be in sympathy with the religious views and usages of the congregation for whom he discharges such a trust, and their power to remove him for acts or omissions which they consider detrimental to the well-being of their religious body, its influence, or its teachings, should be very liberally construed. Where such a place is held by prescription, as it may be in England for life, it is regarded as an office in which the incumbent has a freehold, of which he cannot be deprived by ecclesiastical censures, though punishable thereby (1 Black. Com. 395; 2 Rolles' Abr. 234; 3 Burns' Ecc. Law, title *Sexton*). But it is otherwise where, by the usage, he holds at the pleasure of those who elect or appoint him, for in that case, those who appoint have also the power to remove him at pleasure (*Rex v. Guardians, &c.* 1 Strange, 115).

At a general meeting of the members of the congregation, the plaintiff was elected sexton for a year, at a fixed annual salary, and in pursuance of this election he entered into a contract with the trustees of the congregation, by which he became bound for the faithful performance of his duties, and to observe the orders of the president, so that the reciprocal relation of the parties in the case rests upon contract. At a meeting of the board of trustees afterward, it was resolved to discharge the plaintiff from his employment, for "alleged cause," and he was accordingly discharged before the end of the year. As the defendants had contracted to employ him for a year, they could not discharge him before the expiration of that time, unless for such cause as would entitle them to put an end to the contract and dismiss him. It was no answer to his action for the fulfillment of the contract, that the board of trustees resolved to, and did, discharge him for alleged cause. The cause must be shown, and it must be such as the law would

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deem a sufficient one for dismissing him from his employment. It does not help the case, that he was expelled from his membership in the body, upon the charges which caused his discharge as sexton. The nature of these charges is not disclosed, nor is any thing else shown except that the Supreme Court refused upon *mandamus* to reinstate him in his membership. All this is no answer to the action upon the contract. The relation established by it was that of master and servant, and as the defendants dismissed the plaintiff before the expiration of the time for which he was employed, it was incumbent upon them to show that they did so for sufficient cause, and they have not shown for what cause they dismissed him (Story on Contracts, chap. v. part ii.)

Judgment reversed.

HARRIET E. CHRISTY, AS ADMINISTRATRIX OF THE ESTATE OF
EDWIN P. CHRISTY, DECEASED, *vs.* JAMES S. LIBBY, INDI-
VIDUALLY, AND AS COLLECTOR OF THE ESTATE OF SAID EDWIN
P. CHRISTY, DECEASED.

The Court of Common Pleas has the same powers as those exercised by the late Court of Chancery, and by the present Supreme Court, in all actions where the defendant resides, or is personally served with process, in the city of New York.

The provision of the Revised Statutes, conferring jurisdiction upon surrogates (2 R. S. 95, § 68), was intended to provide an inexpensive and summary mode for bringing executors, &c., to account, but did not take away the power theretofore exercised by courts of equity to afford this species of relief. They still exercise concurrent, and in some cases exclusive, jurisdiction.

An action lies by an administrator against one who had been appointed collector of the estate of plaintiff's intestate by a surrogate, to compel him to account for assets in his hands. And in such an action it is not necessary to aver, in the complaint, an accounting before the surrogate; nor to allege facts from which the surrogate's jurisdiction to grant administration of the estate may be inferred.

In such an action, the defense that proceedings are pending before the surrogate on defendant's accounting, can only be taken by answer.

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APPEAL by the defendant from a judgment at special term, on demurrer to the plaintiff's complaint.

The complaint alleged that on the 21st day of May, 1862, Edwin P. Christy died intestate, and that on the 22d day of May, 1862, letters of administration upon the estate of the deceased were granted by the surrogate of New York to the plaintiff; that the plaintiff qualified and entered upon the discharge of the duties of her office as administratrix; that afterward a contest arose before the surrogate as to the right of plaintiff to be such administratrix, and during the pendency of the contest the defendant was appointed collector of the estate of the deceased by the surrogate; that the defendant entered upon the duties of his office as collector, and as such took possession of certain goods, chattels, moneys and effects of the deceased. The complaint further alleged that the appointment of defendant was only to continue until it was determined who was entitled to administration; that afterward the contest was decided in favor of the plaintiff, and a decree duly entered affirming the plaintiff's right to administer upon the estate of the deceased, and to the control and possession of all the personal property of the deceased. The complaint also alleged that before the commencement of the action, the plaintiff had demanded of the defendant the property, moneys and effects of which he became possessed as such collector, and that he account therefor to her as such administratrix, and that the defendant refused to do so.

The complaint further alleged that a large amount of said property and effects had been converted into money, and that the defendant fraudulently retained possession thereof; that the defendant had, by neglect and mismanagement, lost a large amount of the personal property and effects of which he became possessed as such collector, and had lost, by his omission and neglect, a large amount of other personal property to which he was entitled as such collector, to all of which, plaintiff, as such administratrix, claimed to be entitled.

Judgment was demanded against the defendant that he account for all the personal property, moneys and effects which had come into his possession, and to which he was entitled as such collector; that he be ordered and directed to deliver to the plaintiff, as such administratrix, all the personal property

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and effects still remaining in his possession, and that he pay to her, as such administratrix, all moneys in his possession, and to which he is entitled as such collector; that he pay to her, as such administratrix, the value of all personal property and effects which have been lost through his mismanagement or neglect. The defendant demurred to the complaint on the ground that this court had no jurisdiction of the subject of the action, and that the Surrogate's Court was the proper forum in which to adjust the accounts and control the proceeding of executors, collectors, etc., and on further grounds of misjoinder of several causes of action, and that the complaint did not state facts sufficient to constitute a cause of action.

The special term gave judgment for the plaintiff, with the following opinion by

VAN VORST, J.—Executors and administrators are considered as trustees. The defendant, as collector of the estate, appointed by the surrogate during the contest in his court as to the plaintiff's right to administration, stands in relation to the estate as a trustee. Courts of equity take cognizance of the conduct of executors, administrators, and other trustees (3 *Black. Com.* 437; *Willard's Equity Jur.* 88, 490). Courts of equity have jurisdiction to call an executor or administrator to account; and the power to summon trustees of this character for this purpose was frequently exercised by the late Court of Chancery in behalf of creditors, legatees or distributees of an estate, although the Surrogate's Court had concurrent jurisdiction over those matters. In *Rogers v. King* (8 Paige, 211), the chancellor says: "This court, upon a proper application, would grant injunction as a matter of course, to stay any creditor or others from proceeding before the surrogate, and to compel them to come in and to establish their claims under the decree heard." The Court of Chancery would exercise such restraining power, from proceeding in the Surrogate's Court, where a bill had been filed in that court for an accounting.

A court of equity is a tribunal in which not only the personal fitness and conduct of a trustee may be investigated, but in which his administration of the trust property may be overlooked on a charge of waste, and he may be ordered to account for the property received by him, and to pass and settle

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his accounts. A court of equity has always exercised jurisdiction in such cases—it is inherent to it.

The defendant, having had only a temporary relation to the estate of the deceased, to be ended so soon as it could be determined who was to be clothed with legal power to take the property, is a trustee, and liable to account to the person ultimately appointed the proper representative.

The collector should account to the party legally appointed administratrix, for the property, money and assets which have come into his hands as collector, and for his management of the trust estate, and for property lost by his mismanagement or neglect of duty. A case of this character is a proper subject for the cognizance of a court of equity.

The Court of Common Pleas of the city and county of New York has the same powers as those exercised by the late Court of Chancery in all *actions* where the defendant resides, or is personally served with a summons within the city of New York (Code of Pro. § 33; *Brown v. Irish Presbyt. Cong.* 6 Bosw. 246.)

As the Court of Chancery could have entertained jurisdiction of this action, this court may.

It is true that the surrogate of New York has jurisdiction to summon this defendant to account, and to oblige him to make an exhibit of his affairs as collector of this estate, and may make a valid decree in the premises on a state of facts, as is set up in the complaint in this action (2 Edmond's Stat. at Large, 229, 230).

But it was not designed that the jurisdiction of the surrogate should be *exclusive*. There is nothing in the statute which tends to show that the legislature designed to take away from courts of equity their jurisdiction over cases of this character. In *Seaman v. Duryea* (11 N. Y. 324), it is said that "it was the intent of the legislature in conferring this jurisdiction upon surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of executors and administrators, and to supersede the necessity of a resort to the Court of Chancery for that purpose." All that was meant to be decided in that case upon this point was, that a party was not of "*necessity*" obliged to go into a court of equity in cases of the character designated. If a party elected, there

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was a tribunal open to him in which he could take a more summary and inexpensive method than by resorting to the Court of Chancery. If it had been intended that the surrogate should exercise *exclusive* jurisdiction, it would have been so stated. I have no doubt about the jurisdiction of this court to entertain this action. This disposes of the first ground of demurrer.

There is but really one cause of action set up in the complaint. The matters alleged have relation to the defendant in his character as collector and trustee only.

Defendant is asked to account for what he has received, and for what has been lost through his misconduct and negligence as collector. His conduct and administration as trustee, during the time he held the office of collector, is the subject of inquiry. In the title of the complaint he is described "individually," as well as "collector." The title, it is true, is a part of the complaint (Code of Pro. § 142); but the allegations in the body of the complaint should control the title. By them he is sought to be charged as collector, and it is in that relation only that he is brought into court. It is not claimed that he, otherwise than as *collector*, has interfered with the property and estate of the deceased. He is not proceeded against as a trespasser.

The last ground of demurrer is involved in the consideration of the first and second. If the preceding views are correct, the complaint does set up a cause of action.

Judgment for plaintiff on the demurrer, with leave to defendant to answer in twenty days, on payment of costs.

From the judgment entered on the decision, the defendant appealed to the general term.

Amos G. Hull, for appellant.

C. Bainbridge Smith, for respondent.

BY THE COURT.—DALY, F. J.—The complaint avers the day of the death of the intestate, the granting of letters of administration upon his estate to the plaintiff, the day when they were granted, that they were granted by the surrogate of the city and county of New York, and that the plaintiff qualified and entered upon her duties as administratrix; which is all and even more.

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than was necessary (*Ring v. Roxborough*, 2 Tyrwh. R. 486; 2 Williams on Executors, 1595, and note 1, 4th Am. ed.; 1 Chitty on Pleading, 315; 2 Id. 109, 110, 6th Am. ed.; *Ketchum v. Ketchum*, 4 Cow. 87; *Goldthwayte v. Petrie*, 5 T. R. 234). The granting of letters by the surrogate to the plaintiff is *prima facie* evidence of her appointment, and that he had the requisite evidence before him to authorize his action (*Sibly v. Wolfe*, 16 N. Y. 184, and see cases before cited).

It was not necessary to aver an accounting before the surrogate. The provision of the Revised Statutes conferring the jurisdiction upon surrogates was intended to provide an inexpensive and summary mode for bringing executors, &c., to account; but did not take away the power theretofore exercised by courts of equity, to afford this species of relief. It still exercises a concurrent, and, in some cases, an exclusive jurisdiction (*Rogers v. King*, 8 Paige, 210; Willard's Equity Jurisprudence, p. 560), and this court has the same powers exercised by the Court of Chancery, and now by the Supreme Court, in all actions where the defendant resides or is personally served with process in this city (*Brown v. The Irish Presbyterian Congregation*, 6 Bosw. 246). If the defendant had been cited to account before the surrogate, and an accounting was pending before him at the commencement of the suit, it should be set up by way of answer, for the defendant cannot be required to account before two tribunals at the same time (*Percival v. Hickey*, 18 Johns. 257; Graham's Practice, 228, and cases there cited), where another action or proceeding for the same cause is pending. The decision of the court below, that the plaintiff was entitled to judgment upon the demurrer, was, therefore, right, and the order appealed from should be affirmed.

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MARY CAREY v. THOMAS W. CAREY.

The court having issued an attachment against a defendant, in a divorce suit, for disobedience of an order for the payment of alimony, pending suit, will, in case of the defendant's fraudulent intent to dispose of his property, or to leave the State, interfere by injunction, and will appoint a receiver of defendant's property if necessary to enable the court to apply the remedy provided for by the statute.

APPEAL by the defendant, from two orders, made at special term, enjoining him and his assignee from disposing of his property, and appointing a receiver thereof.

The facts sufficiently appear in the opinion of the court.

John Townshend, for appellant.

Ward, Jones & Whitehead, for respondent.

BY THE COURT.—DALY, F. J.—The grounds upon which the defendant was enjoined from making any disposition of his property, and a receiver of it appointed, were, that the action is for a limited divorce upon the ground of cruel and inhuman treatment, that an order was made for the payment of alimony, to the plaintiff, that the defendant disobeyed the order, and an attachment was issued against him; that he was packing up the goods in his shoe-store, at night, with two cart-loads of furniture and goods packed in front of the door; that the cartman and the defendant both refused to tell where the goods were going; that the defendant cannot, after diligent inquiry, be found; that the clerk, left by him in charge of his store, when inquired of respecting him, replied that he did not know where he was, or when he would be back; that the clerk was engaged in selling out the stock of the store by the case, and not by retail; that there was a bill upon the store, to let; that the defendant declared to the plaintiff's attorney, that he would assign his property to one Graham; and that he has given a mortgage to Graham, covering the whole of his real estate, assigned the lease of his store to his lawyer,

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Mr. Townshend, his furniture to another person, and more than half the goods in his store to several persons. It also appears that he is about to remove his goods to Jersey City, and has left this city and taken up his residence in the State of New Jersey; that he is a confirmed inebriate, and the plaintiff is left with three small children, with no means for their support but the alimony ordered by the court, and which the defendant will not pay.

It is difficult to conceive of a stronger case than this, calling for the equitable interference of the court. The relief here asked is necessary to enable the court to apply the remedy provided for by the statute (2 R. S. 148, § 60); for the sequestration of the defendant's personal estate, and of the rents and profits of his real estate for the payment of temporary or permanent alimony to the plaintiff could not be effectually carried out if the defendant were allowed to make away with and dispose of his property in the manner he is doing and manifestly intends to do.

This court is not, as the defendant's counsel suggests, a court of statutory jurisdiction, except so far as its jurisdiction is limited to cases where the parties reside in, or are served with the summons in this city and county. In all other respects, it is a court proceeding according to the course of the common law (*Foot v. Stevens*, 17 Wend. 483; *Harris v. Seixas*, 21 id. 45), and exercising, since the Constitution of 1846, and under the Code, general powers in affording relief, either at law or in equity. It has, within its territorial limitations, general equity jurisdiction (Townshend's Notes to the Code, note *a*, 8th ed.; *Bowen v. The Irish Presbyterian Church*, 6 Bosw. 246; *In the matter of De Angelos*, 1 Code, R. N. S. 349).

Both orders should be affirmed.

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THOMAS McCAULEY v. ROBERT BROWN and WOLF REGLANDER.

The owner of goods who, by his conduct, enables another to assume the credit of their ownership, whereby a third person is led to purchase them in good faith, cannot recover either the goods or their value from the buyer. It is not necessary that the owner should stand by and permit the sale.

It being unlawful, by a city ordinance, for any one to take out a license as a public cartman, except the actual owner of the cart licensed: *Held*, that where the owner of a cart permitted another to take out a license for his cart, it was tantamount to a declaration of ownership by the licensee, with the owner's knowledge and consent, and the latter will be estopped from claiming ownership as against a *bond fide* purchaser of the cart from the licensee.

APPEAL by the defendants from a judgment of the general term of the Marine Court, affirming a judgment rendered at a special term of that court.

The action was brought to recover the value of a truck and set of harness alleged to belong to the plaintiff. It appeared on the trial that the property had been purchased, and paid for by the defendants, of one John McCauley, a brother of the plaintiff; that John McCauley was a cartman in this city, that he had taken out a license in his own name for the truck, and had held himself out as owner, with the knowledge of the plaintiff. Before the defendants bought it, they went to the mayor's office, and ascertained the fact of the license. It was also shown that prior to the time the defendants bought the truck of John McCauley, the latter had offered it for sale, with the approbation of the plaintiff. Judgment was rendered for the plaintiff, which judgment having been affirmed at the general term of the Marine Court, the defendants appealed to this court.

A. J. Dittenhafer and *C. A. Runkle*, for appellant, cited *Brewster v. Baker* (16 Barb. 618); *Cheaney v. Arnold* (18 Barb. 434); *Hibbard v. Stewart* (1 Hilt. 207); *Thompson v. Blanchard* (4 N. Y. 308).

C. Nagel, for respondent.

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BY THE COURT.—BARRETT, J.—By the provisions of the Revised Ordinances of 1859, p. 356, § 2, it is made unlawful “for any person to receive or hold a license to keep public carts, or to be a public cartman, unless he be the actual owner of the cart or carts so licensed.” The taking out of the license for the truck in question was, therefore, a declaration of ownership made by the plaintiff’s brother, John McCauley, with the plaintiff’s full knowledge and consent, upon which the defendants had a right to and did rely in making the purchase. These facts, coupled with John McCauley’s actual possession, and seeming ownership, bring the case within the principle that when the owner of goods stands by, and permits another to treat them as his own, whereby a third person is led to purchase them in good faith, the former cannot recover the goods, or their value, from the buyer (*Thompson v. Blanchard*, 4 N. Y. 303; *Hibbard v. Stewart*, 1 Hilt. 207; *Brewster v. Baker*, 16 Barb. 613; *Cheaney v. Arnold*, 18 Barb. 434; *Dezell v. Odell*, 3 Hill, 215; *Pickard v. Sears*, 6 Ad. & El. 469; *Gregg v. Wells*, 10 Ad. & El. 90). The doctrine applies, although the plaintiff was not present when the bargain was made. It is sufficient that, by his previous conduct, he enabled his brother to assume the credit of ownership, and to deceive the defendants (*Thompson v. Blanchard*, *supra*).

The judgment with respect to the truck was, therefore, erroneous; and as there was no evidence of the separate value of the harness, except the wholly insufficient statement of what the plaintiff had paid for it some seven months prior to the sale, we have no basis for a modification of the judgment. Besides, the conduct of these brothers savors very strongly of collusion. John McCauley had previously offered the truck for sale, with the plaintiff’s knowledge, and seemingly with his consent—certainly, without any expression of his disapprobation. From these and other unfavorable circumstances, such as the plaintiff’s failure to assert his title upon the discovery of the property in the defendants’ possession, we are not inclined to strain a point with respect to the evidence of value, for the purpose of upholding this judgment, even in part. It is fairer to leave the parties in such a position, that the plaintiff may, if

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he think fit, bring a fresh action for the value of the harness, when the defendants can have these facts and circumstances submitted to a jury, upon the question of collusion and authority.

The judgment should be reversed.

ALEXANDER TURNBULL *et al.* vs. JOHN T. MARTIN.

The "misconduct" and "misbehavior" which, under the statute (2 Rev. Stat. 542, § 10), are grounds for vacating an award of arbitrators, must be acts which evince unfairness, or a violation of all the principles of a just proceeding, and not merely error of judgment, however great.

The mere admission in evidence, by arbitrators, of *ex parte* affidavits in behalf of one party, and their refusal to permit one party to inspect the books of the other party, in respect to which testimony was being given, are not grounds for vacating their award, in the absence of evidence of fraud, corruption, partiality, or unfairness.

Arbitrators are bound by no technical legal rules. They have a right to proceed informally, and in such a manner as, without violating those self-evident and fundamental principles upon which every fair investigation must be conducted, best tends to enlighten their judgment, and enables them in their own way to arrive at the truth and merits of the controversy.

APPEAL by the defendant from a judgment rendered at special term on an award of arbitrators.

The action was brought to recover the price of a quantity of blue blouse flannel, amounting to \$97,684.97, sold and delivered to the defendant by the plaintiff on a credit of four months. The defendant in his answer admitted the contract, but claimed that some of the goods were "imperfect and inferior," and alleged that he had been damaged thereby to the amount of \$26,000, and that he had offered to return the imperfect goods as soon as the defects were discovered, and that he had paid freights and advanced to plaintiffs over \$200,000, and insisted on a balance in his favor.

After the cause was at issue, the parties agreed to arbitrate,

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and the matters in controversy were submitted to two merchants. The arbitrators made their award, giving a gross amount against the defendant. At the same time that a motion to confirm the report came on to be heard, a motion was made by the defendant to set aside the award, or to modify it, on the following grounds:

1st. That the arbitrators received incompetent evidence, and erred, in fact and in law, on the subjects submitted to them.

2d. That certain moneys paid for Government tax were included in the award.

3d. That the arbitrators refused to allow the defendant to introduce the contents of the books of the plaintiffs, but as to some matters, and in some instances required the books to be produced before them; allowed the witness to testify as to matters contained in the books, but refused to allow the defendant to examine the portion of the books upon which testimony was given.

The court, at special term (Cardozo, J.), having reduced the award by the amount of the Government tax, confirmed it as to the residue.

From this decision the defendant appealed to the general term.

Aaron J. Vanderpoel, for appellant, cited *Clusman v. Merkel*, 3 Bosw. 402; *Wood v. Auburn and Rochester R. R. Co.* 8 N. Y. 160; *Ott v. Schroepfel*, 5 Id. 482; *Viele v. Troy & Boston R. R. Co.* 21 Barb. 381; *Winship v. Jewett*, 1 Barb. Ch. 173.

Foster & Thomson and Edwards Pierrepont, for respondent, cited *Ketchum v. Woodruff*, 24 Barb. 147; *Smith v. Cutler*, 10 Wend. 589; *Emmet v. Hoyt*, 17 Wend. 410; *Viele v. Troy & Boston R. R.* 21 Barb. 381; 20 N. Y. 184; *Owen v. Boerum*, 23 Barb. 187; *Emery v. Hitchcock*, 12 Wend. 156; *Perkins v. King*, 10 Johns. 143; *Cranston v. Kenny*, 9 Id. 212; *Sharp v. Dusenbury*, Col. & C. Cas. 134.

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BY THE COURT.—BARRETT, J.—This case comes before us upon an appeal from a judgment entered on the award of arbitrators. The arbitration bonds were executed after the joining of issue between the parties in an action brought in this court. The dispute was in respect to a quantity of flannels, and the bonds provided for the submission of all the matters arising under the pleadings to two dry-goods merchants, one chosen by each of the parties, with the additional proviso, that the umpire, in case of disagreement, should also be chosen from among the dry-goods commission merchants. The arbitrators were attended by the respective parties in person, and without counsel, and thus the whole matter was completely withdrawn from the court, and placed exclusively in the hands of laymen, specially chosen by the parties from the class most conversant with the subject-matter of the controversy. The award was in favor of the plaintiffs, and was made without disagreement, and consequently without the necessity of calling in an umpire.

An award, under such circumstances, should not be lightly disturbed; certainly not without some evidence of fraud, corruption, partiality, or unfairness. Nothing of the kind is suggested here, and the only grounds upon which a reversal is claimed are, first, that the arbitrators received as testimony, on the plaintiff's behalf, some *ex parte* affidavits; and, second, that they refused to permit the defendant to inspect those parts of the plaintiff's books, in respect to which testimony was being given. These objections are not well founded in fact, as will presently be shown; but were they clearly established, the acts complained of do not amount to such misconduct or misbehavior as would justify us in setting aside the award. The statute, by these terms "misconduct" and "misbehavior" (2 R. S. 542, § 10), contemplates acts evincing unfairness, or contrary to all the principles of a just proceeding, such as those discountenanced in *Walker v. Frobisher* (6 Ves. 70), and in *Knowlton v. Mickles* (29 Barb. 465), and not mere errors of judgment, however great (*Smith v. Cutler*, 10 Wend. 589; *Ketchum v. Woodruff*, 24 Barb. 147; *Cranston v. The Executors of Kenny*, 9 Johns. 212; *Herrick v. Blair*, 1 Johns. Ch.

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R. 101). Arbitrators are bound by no technical legal rules. They have a right to proceed informally, and in such a manner as, without violating those self-evident and fundamental principles upon which every fair investigation must be conducted, best tend to enlighten their judgment, and enable them, in their way, to arrive at the truth and merits of the controversy. The rule which would vitiate an award whenever affidavits are, although openly and without any unfair or dishonest purpose, received by the arbitrators, and estimated according to the value which their judgment may place upon them, would produce the same result were the decision partially based upon a personal inspection by the arbitrators themselves in the presence of both parties, of the goods or articles claimed to be inferior. The short answer to all the arguments adduced in support of such a rule is, that the parties have agreed to remove their controversy from the regular tribunals, where justice is administered in an orderly manner, and in accordance with precise and well-settled rules, and have submitted to such judgment as their chosen merchant-peers may pronounce after a simple and informal investigation, conducted according to the layman's ideas of common sense, and at which honesty and impartiality are alone contracted for or desired. These views are based upon the assumed correctness of the facts stated in the defendant's affidavit. His statements, however, are explicitly denied by the plaintiff Turnbull, who explains that the affidavits were merely marked by the arbitrators for identification, and that the question whether they were to be entirely disregarded or received for what they were worth, was reserved. There is no evidence as to the final disposition of this question, and thus it does not appear that the affidavits were ever in reality considered. The point in respect to the book is met by the same plaintiff, who states, in answer to the averment upon that head in the defendant's affidavit, that the arbitrators did "allow him" (the defendant) "if he wished, to inspect all the entries as to which evidence was given."

The remaining objection, that the arbitrators refused to receive evidence on behalf of the defendant, as to the contents of

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the books, is not substantiated even by the defendant; for he merely says that he desired to introduce such evidence, without intimating, however, that he expressed his desire, or that it was refused. The judgment and order, denying the motion to vacate the award, should be affirmed with costs.

JOSEPH R. BASSETT v. PAUL SPOFFORD AND THOMAS TILESTON.

The plaintiff sold goods to C., to be paid for on delivery after their arrival in New York. On their arrival in New York, C., on the pretense that he desired to examine the goods, induced the plaintiff's agent to give him, for that purpose, the carrier's receipt for the goods. Upon the receipt thus obtained the carrier delivered the goods to C., who forthwith put them on board the defendants' vessel consigned to Havana. The plaintiff's agent learned the fact the next day, and on the following day, and a few hours before the sailing of the defendants' vessel, he demanded the goods from the defendants, and offered to pay the freight and to indemnify them in a bond for double the value of the goods. The defendants refused to unship the goods, unless indemnified in the sum of \$50,000, as it would necessitate moving a large part of the cargo, and delay the voyage a day or two.

Held, 1. That the delivery of the carrier's receipt to C. was not, under the circumstances, a delivery of the goods to him, nor a waiver of payment therefor, so as to pass the title.

2. That as it was through the incautious act of the plaintiff's agent that C. was able to get possession of the goods, and to ship them on board of the defendants' vessel, the latter, being innocent parties, were not bound to detain their vessel and unload their cargo to enable the plaintiff to recover his goods, unless they were indemnified for any loss or expense they might thereby incur.
3. The burden of proof was upon the defendants to show that the indemnity tendered by the plaintiff was insufficient to cover the loss or damage they would incur by the delay, &c., and having failed to show it, they were liable to the plaintiff as for a conversion of the goods.
4. The issuing, by the defendants, of a bill of lading of the goods, furnishes no defense to such an action.

APPEAL by the defendants from a judgment entered upon the verdict of a jury found by the direction of the court at trial term.

The action was brought to recover the possession of 200 dozen ladies' shoes, of the value of \$2,200. The defendants, who were owners of the steamship *Eagle*, bound from New York to Havana, for a defence, averred that they received the shoes from J. R. Carreras, on board of the steamer, and that they had rightfully issued a bill of lading for the goods prior to any demand from the plaintiff. It appeared on the trial, that in December, 1862, Carreras negotiated with the plaintiff, at Boston, for the shoes, and was to pay cash for them on delivery at New York. The plaintiff shipped them to New York, in charge of his clerk, J. T. Moore, with instructions to deliver the goods on receiving the money. On his arrival at New York, Moore called on Carreras, told him he had the goods, and asked for the money. Carreras said he would pay at a later hour, and that he would like to examine the goods, and Moore gave him the railroad receipt, to enable him to examine the goods. Moore, afterwards learning the shoes had been put on the *Eagle*, went to that vessel and notified the purser and captain, and demanded the goods. The defendant, Tileston, on a second demand, refused to deliver, and demanded a bond of \$50,000. The plaintiff offered to give a bond of \$5,000. The bill of lading was not produced, nor were the ship's bills of lading produced. Some of the witnesses, however, testified that a bill of lading had been issued, but to whom was not stated, and defendant's record of bills of lading was produced, containing a copy of the bill alleged to have been issued. On the conclusion of the testimony, counsel for the defendants requested the court to charge the jury that the plaintiff, by delivering the receipt for the goods to Carreras, gave to him the apparent right of ownership; so that the defendants, after receiving the goods, were entitled to hold them until the plaintiff indemnified them against all damage to which they might have been subjected in consequence of what they had done, acting upon the faith of that delivery. Also, that the plaintiff, by his negligence in delivering the receipt for the goods to Carreras, was estopped from recovering in this action; and that the question of negligence was one of fact, which the defendants had a right to have submitted to the jury.

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The court refused both requests, and directed the jury to find a verdict for the plaintiff for the value of the property and damages for its detention.

The defendants appealed.

Gilbert Dean, for appellants.

H. M. Whitehead, and *A. J. Vanderpoel*, for respondent.

BY THE COURT.—DALY, F. J.—The sale of the goods was for cash, payable on delivery ; and where such is the condition, payment and delivery are simultaneous acts and no title passes until the goods are paid for, unless payment at the time of the delivery has been waived (*Leven v. Smith*, 1 Denio, 573 ; *Baker v. Bourcicault*, 1 Daly, 26, 27). The delivery to Carreras, by the plaintiff's agent, of the railroad receipt, was merely for the purpose of enabling the former to examine the goods, which were then in four cases upon the pier, it being customary in New York to allow the vendee to open the cases and examine the goods. The delivery of the receipt to Carreras for such a purpose was not a delivery to him of the property, and the title remained in the plaintiff. There was nothing to show that either the plaintiff, or his agent, intended to waive the condition of payment upon delivery ; but, on the contrary, the agent insisted throughout upon payment, and had no authority to waive it.

The delivery of the railroad receipt, however, enabled Carreras to obtain possession of the goods, and to ship them in the defendants' vessel for Havana. The possession of this receipt by Carreras was not necessary to enable him to examine the cases. He was a person of whom neither the plaintiff, nor the plaintiff's agent, knew anything, and if he desired to examine the cases, the agent should have gone with him to the railroad pier and afforded him the opportunity. Instead of doing this, the agent delivered into his possession the railroad receipt, which was equivalent to the transfer of a bill of lading, and thereby enabled him to possess himself of the property, and carry into effect his fraudulent design. The receipt was ob-

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tained on the 14th of December. On the 15th, the agent learned that Carreras had obtained the goods, and had shipped them, and it was not until the next day that a demand for them was made upon the defendants, which was renewed on the following day, the 17th, the day of the departure of the steamer. When the demand was made on the part of the plaintiff, the four cases were in the forward hold of the vessel, and so far beneath the cargo that they could not be taken out without delaying the departure of the steamer for a day or two, a matter of more than ordinary moment, as the vessel carried the United States mail. "Every man," says Gould, J., in *Cartwright v. Wilmerding* (24 N. Y. 529), "is bound to take care not to select an agent who will do acts to injure other persons," and as it was through the incautious act of the plaintiff's agent that Carreras was able to get possession of the goods, and to ship them on board of the defendants' vessel, the defendants, being innocent parties, were not required to detain their steamer, and unload their cargo, that the plaintiff might get back his goods, unless they were indemnified for any loss or expense they might thereby incur.

The plaintiff's attorney offered to give them a bond of indemnity in \$5,000, the value of the goods being \$2,200, and to pay the freight; but the defendants demanded a bond in \$50,000. The attorney said he thought it was exorbitant, and that his client could not give it, upon which one of the defendants replied, "You can go on board the steamer and get the goods if you can." He tried to do so, but the cases were then covered up in the back part of the hold, and he was told by the men having charge of the freighting, that it would take a day or two days to get at them. The steamer left that day at 3 o'clock P. M.

The plaintiff's right to the property was indisputable, and as the plaintiff had offered to pay the freight and to give a bond of indemnity in \$5,000, it was incumbent upon the defendants to show that a bond in that amount would not cover the loss or expense to which they would be subject. It was for them to show what loss or damage they would be put to by the detention of the vessel and the unshipping of the goods, for

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that was a matter peculiarly within their own knowledge, and it is a familiar rule of evidence that where such is the case the onus is shifted from the plaintiff to the defendant. They positively refused to comply with the demand made on the part of the plaintiff, unless they received a bond of indemnity in \$50,000, and it was for them to give, at least, some evidence to show that they required no more than what was reasonable under the circumstances. They gave no evidence upon this head whatever.

The defendants relied upon the trial upon the fact that they had given bills of lading for the goods to Carreras, and had thereby obligated themselves to deliver them at Havana to the consignee named in the bills or to his assigns. The judge held that there was not sufficient proof of the issuing of bills of lading, and the defendants insist that as there was some evidence of the fact, which was received without objection, it was a question not for the court, but for the jury. But the point was wholly immaterial; for, conceding that they did give bills of lading to the person from whom they received the goods, and in whose name they were shipped, it would be no defence as against the true owner. As they were fully advised of the circumstances under which the goods came into their possession as carriers, they were bound to restore them to the rightful owner; and if, after being duly notified, they delivered them to the consignee because they had given bills of lading, they did so at their peril. The consignee, even if he had made advances, *bonâ fide*, upon the bills, could not, under such circumstances, claim the goods as against the owner. "If a person, without authority from me," says the Chancellor in *Saltus v. Everitt* (20 Wend. 272) "ship my goods and take a bill of lading in his own name, he cannot, by assigning that bill of lading to another, divest my title to the property." "The universal and fundamental principle of our law of personal property," says Verplanck, senator, in the same case, "is, that no man can be divested of his property without his own consent, and consequently the honest purchaser under a defective title cannot hold against the true proprietor;" and after an extensive and admirable review of the law upon this head, he re-

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marks, "there is no case to be found, or any reason, or any analogy any where suggested in the books, which would go to show that the real owner could be concluded by a bill of lading, *not given by* himself, but by some third person, erroneously or fraudulently. The assignment of the bill of lading conveys, not an absolute right to the goods, but the right and title merely of the actual consignor, who is alone bound by it." And as Carreras, the consignor in the present case, had no title, he could transfer none to his consignee, or that consignee's assigns. This rule, though it may operate injuriously upon innocent parties, acting *bonâ fide*, serves, as the learned senator remarks, the just interests of commerce, whilst it imposes upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution. The case is different where the owner is the consignor and delivers over the bills of lading, though under circumstances that would entitle him to reclaim the property upon the ground of fraud; for in such a case, a holder of the bills, who had *bonâ fide* made advances upon them, or given other valuable consideration for them, would be protected, because he relies, as he is entitled to do, upon the act of the consignor.

The judgment should be affirmed.

OWEN MARRY v. EDWARD D. JAMES AND FREDERICK
P. JAMES.

To justify a court of equity in restraining a judicial officer in the exercise of his legitimate functions, on the ground that he is a necessary and material witness in certain proceedings pending before him, it should appear clearly and unmistakably, that the judicial testimony is not of itself privileged, and that its absence would involve a complete denial of justice.

In view of the stringent provisions of the statute (2 Rev. Stat. 516, § 47) summary proceedings by a landlord against his tenant, pending before a judicial officer having jurisdiction, should be enjoined only in cases of fraud, surprise, or undue advantage in the conduct of the proceedings.

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It seems that the city judge of the city of New York has jurisdiction of summary proceedings.

APPEAL by one of the defendants from an order denying a motion to dissolve an injunction heretofore granted herein.

The facts sufficiently appear in the opinion of the court.

Edward D. James, for appellant.

Isaac S. Bryan, for respondents.

BY THE COURT.—BARRETT, J.—It is difficult, upon the papers submitted, to ascertain the precise point presented by this appeal, and our labors would have been greatly aided, and doubtless abbreviated, by an oral argument. The difficulty to which I refer will be best illustrated by a brief reference to the salient facts and to the present posture of the case itself. The plaintiff avers that he is the owner of a valuable lease of the premises, No. 111 West 29th street, in this city, and that certain persons, whose names are unimportant for the purposes of this discussion, occupy the premises as his tenants. The general title to the premises, as well as the manner in which the plaintiff acquired the lease, and became landlord of the persons in possession, is also set out, but it will not be necessary to refer to it. The charge, in brief, is, that the defendants, confederating together to obtain possession of the premises, have fraudulently concocted an apparent, but really sham, title, which now rests in the defendant, Frederick P. James. The various links in the formation of this alleged fraudulent claim of title are set forth, and the plaintiff then avers, that as part of the scheme, the defendant, E. D. James, acting as the agent of F. P. James, has instituted summary proceedings before the city judge, for the purpose of ejecting the plaintiff's tenants, untruly alleging therein that F. P. James rented the premises to certain persons, named Jackson, Denison, Waugh and Teller, who, on their part, have sublet to the plaintiff's tenants, so as, to quote the language of the complaint, "to draw the legal relation by derivation of landlord and tenant between him, the said F. P. James, and the

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said tenants of him, the said plaintiff." The plaintiff is not made a party to these proceedings, but his tenants have appeared therein, and deny that they rented from James' alleged tenants or that they know any landlord save the plaintiff. It is further stated that proceedings of a similar character had been previously instituted by E. D. James before the city judge, wherein his preliminary affidavits were contradictory, and that the city judge is a necessary witness for the plaintiff's tenants in the proceeding, now sought to be enjoined, for the purpose of producing his records and proving these affidavits; and it is charged that the proceedings in question were instituted before the city judge for the inequitable purpose of depriving the plaintiff's tenants of the benefit of that officer's testimony.

Upon substantially these averments the plaintiff prays that the summary proceedings in question may be restrained, and that the defendants may be enjoined from instituting any proceedings tending to disturb the possession of the plaintiff, and his tenants, other than a regular action of ejectment.

It is evident that Judge Brady, who granted the injunction, did not consider the plaintiff entitled to such sweeping relief, as his order expressly reserved to the defendants the right to institute summary proceedings before the justice of the district court within whose jurisdiction the premises were situated. Why this permission was not extended so as to include the other officers—the mayor, recorder, and justices of the Marine Court—upon whom jurisdiction in these proceedings is conferred, does not appear; but the fact that such proceedings were permitted at all shows that the injunction was aimed solely at the particular proceeding then pending, and that the facts were deemed insufficient to warrant the general injunction prayed for. In that opinion I entirely concur, for reasons to which I will presently advert; but I go further, and, after careful consideration, I think the facts were insufficient to support even the limited injunction granted. In the aspect of the case upon which this particular proceeding, and that alone, was restrained, the equity of the complaint consists simply in the averments respecting the testimony of the city judge. Now, how is the plaintiff prejudiced by the inability of his tenants to pro-

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cure that testimony? He is neither a party to the proceedings, nor in any legal sense privy to them. Neither his title nor James' can be tried therein. If the relation of landlord and tenant really exists by agreement between himself and these tenants, it cannot be disturbed by a proceeding in which the only issues are whether that same relation exists by agreement between other and distinct persons, and whether these tenants in occupation have (illegally if, as the plaintiff states, they are really his tenants) attorned to any such other persons. These tenants can only be disturbed by James, in case they have, in violation of their duty to the plaintiff, assumed the position, by express agreement and not by mere operation of law, of sub-tenants of James' alleged tenants. The proceedings being based, therefore, upon the existence of an agreement which, if entered into, was a practical denial of the plaintiff's title, and upon alleged facts, with which neither the plaintiff nor his assigns are in any wise connected, this action cannot be sustained on the ground of the landlord's duty to protect his tenants in the quiet enjoyment of the demised premises. The plaintiff, therefore, really has no interest in the summary proceedings. They cannot affect the relations subsisting between the tenants and himself, and should they even result favorably to James, and thus enable him to acquire actual possession—a most unlikely contingency upon the facts before us—still, as against the plaintiff, he would, if devoid of title, be as much a mere trespasser, as though, without any proceeding, the premises had been collusively abandoned to him by the plaintiff's tenants. It is for the tenants, therefore—for they alone are interested in the proceedings—to complain if unjustly deprived of testimony. The result, however, would have been the same if the action had been instituted by the tenants. A very strong case should, in my judgment, be presented to justify a court of equity in restraining, upon such grounds, the exercise of legitimate judicial functions. Otherwise any judge may be ousted of his lawful jurisdiction by a loose affidavit, claiming generally, upon the advice of counsel, that he is a necessary and material witness for one side or the other. The utmost that can be gleaned from the plaintiff's complaint and affidavits is, that the city

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judge may, by producing the records of the previous proceedings, shake the credibility of E. D. James. Surely, this does not make the city judge "a necessary and material witness for the plaintiff's tenants, without the benefit of whose testimony they cannot safely proceed to trial." Ought we, from that slight circumstance, prevent the exercise of a lawful jurisdiction? We are not even assured that E. D. James will be a witness in those proceedings, nor that his testimony is likely to affect the result, nor that the plaintiff has ineffectually requested, either the judge to have these previous affidavits before him at the trial or his adversary to admit them. There is nothing but the bald fact that the judge has in his possession certain records, in which are embodied affidavits made by E. D. James, conflicting in respect to the alleged term of hiring with each other and with that upon which these last proceedings are founded. It appears, also, by the plaintiff's own papers, that the tenants have it in their power, not only to contradict, but actually to impeach the witness in question; and thus the testimony, upon the alleged deprivation of which the equity of the complaint rests, will probably be merely cumulative. The interference claimed should be most sparingly exercised, and only upon facts the extreme opposite in strength and importance of the exceedingly slight averments here presented. It should, in fact be made to appear, clearly and unmistakably, that the judicial testimony is not of itself privileged, and that its absence would involve a complete denial of justice.

This disposes of what I understand, from the nature of the injunction granted, to be the real question argued at special term; but as the motion to dissolve may possibly have been denied upon the ground that the plaintiff was entitled to a general restraint of any summary proceedings whatever, it becomes necessary to consider that question without reference to the permission to proceed before the district court judge (which, if that view be correct, should not have been embodied in the original order), and apart from the special facts upon which the particular proceeding before the city judge was sought to be restrained. I have already expressed my concurrence in the opinion upon that head, which Judge Brady must have entertained when the

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permission referred to was engrafted upon the original order; and my reasons therefor, so far as they are based upon the plaintiff's want of interest in, or privity to, the proceeding have been sufficiently expressed. It may be added, that the only cases where, in view of the stringent provisions of the statute (2 Rev. Stat. 516, § 47), these proceedings should be enjoined, are cases of fraud, surprise, or undue advantage (*Smith v. Moffat*, 1 Barb. 65; *Wordsworth v. Lyon*, 5 How. P. R. 463; *Hyatt v. Burr*, 8 How. P. R. 168; *Duigan v. Hogan*, 1 Bosw. 645, where the subject was exhaustively considered; *Bokee v. Hamersley*, 16 How. P. R. 461; *Marks v. Wilson*, 11 Abb. P. R. 87; *Seeback v. McDonald*, *Ib.* 95; *Aaron v. Baum*, Superior Ct. special term, March, 1868, see N. Y. Transcript of April 4, 1868); not these acts generally or collaterally, but fraud under cover of these proceedings, or surprise or undue advantage in their conduct; such, for instance, as the service of the summons so short a time before the hour fixed for its return as to render it physically impossible for the tenant to reach the court-room before the hearing (*Griffith v. Brown*, 28 How. P. R. 4; *Cure v. Cranford*, 5 How. P. R. 293, which was correctly decided upon its particular facts, although the reasoning, like that of *Capet v. Parker*, 1 Code R. N. S. 90, has long since been overruled; *Forrester v. Wilson*, 1 Duer, 624, the facts of which case are more fully detailed in *Duigan v. Hogan*, above cited). Here there is neither fraud, nor surprise, nor undue advantage in the proceedings themselves. The tenants have had full notice, have interposed their defence, and adjourned the proceedings for a regular and orderly trial. The fraud complained of consists in the falsity of the affidavit upon which the proceedings are based; but that is the very matter at issue, and to be there tried. With the object and intent of the defendants in seeking that trial we have nothing to do. The respondent raises the point that the city judge has no jurisdiction in summary proceedings. That question is not to be tested by injunction, but by prohibition if before judgment, or thereafter by action, if damage has been sustained. I have no doubt, however, that the jurisdiction exists. The decision of the Court of Appeals, in *Nash v. The People* (33 How. P. R. 384), does not affect the question, as it

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was merely held that the recorder, for the reasons there given, had no authority to issue the writ of *habeas corpus*, while that officer is expressly named in the statute with respect to summary proceedings. The city judge, then, being vested by law with the judicial powers and functions of the recorder, jurisdiction being expressly conferred upon the latter officer by the statute, and the character of the proceedings being unquestionably judicial, and the point is fully disposed of. The order should be reversed, and the injunction dissolved.

RICHARD D. BRINCKERHOFF v. THE BOARD OF EDUCATION *for the city and county of New York, and the SCHOOL OFFICERS OF THE NINETEENTH WARD, impleaded with THE MAYOR, ALDERMEN, &C., OF NEW YORK, and others.*

Under an execution upon a judgment against a municipal corporation, the property of the corporation, *not devoted to public use*, may be taken and sold to satisfy the judgment. If there is no such property, the remedy is by *mandamus*, to compel the payment out of any money or fund under the corporate control, or to compel the raising of it by a tax, when the corporation has the power to impose a tax, or if, as is the case in the city of New York, the sanction of the legislature must be obtained, then to compel the corporation to include the amount of the judgment in its budget or petition to the legislature for authority.

A lien (under the Mechanics' Lien Law of this State) cannot be acquired for work done or materials furnished toward the erection of a public school-house, erected under the provisions of certain statutes, by which it is devoted to a public use, such property being exempt from seizure and sale under an execution, upon grounds of public necessity.

APPEAL by the plaintiff from a judgment dismissing the complaint.

The action was brought to foreclose a mechanic's lien for labor done and materials furnished toward the erection of a public school building in the nineteenth ward of the city of New York.

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Benjamin G. Hutchings, for appellant.

Abraham R. Lawrence, Jr., for respondents.

BY THE COURT.—DALY, F. J.—I expressed the opinion, in *McMahon v. The Tenth Ward School Officers* (12 Abb. 129), that a party who performed work toward the erection of a public school-house in the city of New York, had a lien upon the building, which could be enforced under the acts for the better security of mechanics and others erecting buildings, or furnishing materials therefor, in this city (Laws of 1851, ch. 513; of 1855, ch. 404). But the point was not taken in that case, nor necessarily involved, as the judgment was reversible upon other grounds. In the notice of lien, The Board of School Officers, The Board of Education, The Mayor, Aldermen, and Commonalty of the city were alleged to be the owners of the school-house, and the notice to foreclose it was served upon each of these bodies. At the hearing, the referee dismissed the complaint, upon the ground that The Mayor, Aldermen, etc., were the owners of the building; that the contract was made with The Board of School Officers, and with The Board of Education, who were not the owners, nor the agents of the owners, and that consequently there was no contract with the owner of the building, in pursuance of which the plaintiff, who was a subcontractor, could acquire any lien. The point to be determined, therefore, was, assuming that a lien could be acquired, whether the referee was right in holding that the notice was defective, in alleging that the Board of School Officers and the Board of Education were, in conjunction with The Mayor, Aldermen, etc., the owners. This, as the case came before us, was the only question presented, and in conformity with a previous adjudication of this court, affirmed by the Court of Appeals, in *Loonis v. Hogan* (9 N. Y. 440), to the effect that one for whom the building is erected, and who is to pay for it, though he has not the legal title, and only an equitable interest in the land, is the owner, we held that these three bodies, having distributed between them all the rights and powers which the owners of such a building could possess, were, for the pur-

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poses of the lien law, to be deemed collectively the owners. I, individually, was of the opinion that a school-house was within the design of the lien law. My colleagues, Judges Brady and Hilton, gave no opinion; they simply concurred in reversing the judgment; and my own opinion upon the point was expressed without the full examination which I have now given to it, as it is distinctly raised, and must be passed upon. It is sufficient, therefore, to say that we are not, under the rule of *stare decisis*, precluded by any thing decided in *McMahon v. The School Officers*, from considering whether under the statute a lien can be acquired for work done or materials furnished toward the erection of a public school-house, erected in accordance with the provisions of certain laws of the State relating to this city, and which is devoted by these laws to a public use (Laws of 1851, p. 749, §§ 28, 10, 25, 27; of 1853, p. 635, §§ 14, 2, 11; of 1854, p. 241, § 10).

Since the decision in the case of *McMahon v. The School Officers, etc.*, the Court of Appeals, in *Darlington v. The Mayor &c. of N. Y.* (31 N. Y. R. 164), have considered the question how far a judgment against the city can be enforced by a levy and sale of property belonging to, or held in trust by it, as a municipal corporation. Chief Justice Denio, by whom the opinion of the majority of the court was delivered, held that a municipal, equally with a private, corporation, may have its property taken in execution, if payment of a judgment is not otherwise made; but he distinguishes, as exempt from the exercise of this right, such estate, real or personal, as may by law, or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture or ornaments, or the public parks or grounds, or such as may be legally pledged for the payment of its debts. These, he holds, cannot be seized to satisfy a judgment, as these structures are public property, devoted to specific public uses, in the same sense as similar structures are, in use by the State government, and though this is a distinction which appears to have been taken for the first time, it is one that commends itself as founded in public necessity.

It is said, in *Cuddon v. Eastwick* (1 Salk. 193; Holt, 433;

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6 Mod. 123), that a municipal corporation is properly an investing of the people of a place with the local government thereof. Chancellor Kent applies to such bodies the characteristic appellation of "local republics," and says more particularly afterward, "they are created by the government for particular purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the people of the State" (2 Kent's Com. 804). To which it may be added, that they are allowed, as has been repeatedly said, to assume some of the duties of the State, and enjoy property and power for that purpose, as auxiliaries of the government, and trustees for the people (*McKim v. Odoer*, 3 Bland's Ch. R. 417; Angell & Ames on Corporations, § 18; *Darlington v. The Mayor, etc.*)

Municipal corporations are said to have come into use in England in the form of boroughs, through an arrangement by which certain managers of the local community undertook to pay the yearly rent or sum due to the superior or sovereign, in consideration of which they were permitted to levy the old duties, and were responsible for the funds committed to their care. This privilege of farming their tolls or duties was afterward confirmed to them by acts of incorporation embracing other privileges, either gradually acquired or long enjoyed in places where the Romans had introduced the *municipia*, or cities enjoying the local right of self-government (Thompson's Essay on Municipal History, pp. 10, 11, 12; Palgrave's Anglo Saxons, pp. 6, 11; Millar's English Government, p. 340; Angell & Ames on Corporations, §§ 16, 18, 21).

Having thus the right to collect duties, and being responsible for the funds coming into their hands, it came to be recognized, very naturally, that they might, on the one hand, sue to enforce the payment of duties, and, on the other, be themselves sued to compel them to discharge the obligations they had assumed. As their municipal authority and duties gradually increased, the power to bring actions, and their liability at the suit of others, was both increased and varied. Actions by and against them are to be found as early as the Year Books, and

the power was generally conferred specifically in the acts of incorporation; but the works of authority are barren of exact information as to the manner in which judgments against them were enforced, which may have arisen from the fact that they rarely refused to pay a judgment when recovered, and were always able, from the nature of their powers, to procure the means to discharge it.

In *Rex v. Gardiner* (Cowp. 86), Justice Aston says: "As to the remedy of levying a duty upon a corporation, the books all agree that it may be levied, but they differ as to the mode." But he was speaking only to the question whether a private corporation—that is, a college—could be rated for the support of the poor of a parish. It is probable that a municipal corporation might, as was held in the case of private and trading corporations, be compelled to appear, or obey decrees for the payment of money after execution issued, by the common-law process of *distringas*, under which the lands and goods of the corporation could be distrained, and, in the event of noncompliance, sequestered (*The Master and Wardens of the Company of Wax Chandlers*, Skin. 24; *The African Co.* Id. 84; 1 Ver. 121; *The East India Co.* 2 Id. 396; Precs. in Chy. 129; *The Hamborough Co. of Merchant Adventurers*, Cases in Ch. 204). The right, however, to recover a judgment against them, would necessarily carry with it the right to enforce the payment of it. But the mode of enforcing it, so far as I have been able to find, is by no means clearly indicated.

Rolle, C. J., in the case of the *Town of Colchester* (Styles, 267), says: "If a sum of money be to be levied upon a corporation, it may be levied upon the mayor, or upon any person being a member of the corporation." And in another case, in Styles, 366, the court ordered a *distringas*, to levy a fine of twenty pounds, imposed after indictment, upon the inhabitants of a parish, for not keeping a bridge in repair. But I do not find in the early abridgments of Fitzherbert, Brookes, or Shepard, nor in that great repository of the common-law adjudications, Viner's Abridgment, nor in the English treatises which I have examined, any thing to indicate that judgments against municipal corporations ever were or could be enforced by the

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seizure and sale of buildings, or other property of the corporation, devoted to public objects, such as jails, poor-houses, markets, court-houses, and other structures necessary in the local government of the place, and indispensable to enable a municipal corporation to carry out the purpose for which it is created.

There are three cases, of comparatively recent origin, all relating to the borough of Poole, a small seaport town in the south of England, in which, or in one of which, this right appears to have been recognized; but the point was not involved, and it is apparent from the report of each case, that in no one of them was the question examined, or so deliberately considered and passed upon, as to entitle it to the weight of an adjudication. This will appear from a very brief statement of these cases.

In the year 1837, the Mayor, Aldermen, and Burgesses of the Borough of Poole, being indebted to their town clerk for his services, gave him their bond for £4,500, payable in installments. The first two installments remaining unpaid, he obtained a peremptory *mandamus* to compel the corporation to enforce payment out of the existing borough rates, or to collect another rate to pay the two installments, which the corporation having failed to do, he applied for an attachment, which was refused. It appears to have been conceded, from the report of the case, that a *mandamus* would lie to compel the corporation to levy a tax, if there were no other means of enforcing the payment of the debt; but the attachment was denied, because by the 5th and 6th of Wm. IV. ch. 76, the employees of a municipal corporation are to be paid out of the borough fund, and not out of that portion of it which consists of rates. The *mandamus* obtained required the corporation to pay out of the existing or any future rates, thus specifying the means by which payment was to be obtained, and leaving the corporation no option to resort to any other, there being no allegation in the *mandamus* that the corporation had no other fund from which payment might be made (*Régina v. Ledgard*, 1 Q. B. 616).

The town clerk afterward obtained a judgment against the

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corporation upon the bond, and sued out an *elegit*, a process under which the lands of the defendant in a judgment may be given into the possession of the plaintiff, and held until the judgment is satisfied out of the rents and profits of the land, or it is paid by the defendant, when the land is restored to him. He sought under the *elegit* to obtain possession of the town-hall and markets, with the view, I suppose, of having the tolls of the latter applied to the payment of the judgment, but being unable to get possession, he brought ejectment. The corporation applied to defend, without confessing that they were in possession, upon the ground that their property, under the 5th and 6th Wm. IV. ch. 76, was applicable to public purposes only, and could not be taken upon execution. The court refused the application, upon the ground that the corporation would not be prejudiced in such a defense, whether it was available or not, by admitting possession. Lord Denham, C. J., declared, however, that the court did not wish to be understood as giving any countenance to the supposition that the corporate property, although directed by the statute to be applied to public purposes, and not to the private benefit of the members of the corporation, was protected from the lawful claims of persons having demands upon the corporation (*Doe ex dem. Parr v. Roe*, 1 Q. B. 700).

This was expressing a very decided opinion upon the point, but it is apparent, as I have said, that the question was not examined, or so deliberately considered as to give to the case much weight, especially when, as will be shown hereafter, there has been an express adjudication in this country to the contrary.

In 1843, the corporation leased their market-house, with the customs and tolls, to one Whitt, for the period of three years, at an annual rent, subject to two mortgages, which had been given in 1822. The town clerk having sued out his *elegit* before the lease was given, called upon Whitt to pay rent to him, or that he would turn him out, which Whitt did, and attorned to the town-clerk, without the privity of the corporation. The corporation having sued Whitt for the rent due upon the lease, he set up his eviction by the town clerk, and the possession of the town clerk

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upon his *elegit*; but the corporation recovered the rent, the court holding that the right of immediate possession was in the mortgagees, and that the town clerk could not enter nor acquire any title under his *elegit*, the corporation having nothing to which the *elegit* could apply, except the legal right to the reversion, which was a very remote one, the mortgage being given for one thousand years (*The Mayor &c. of Poole v. Whitt*, 15 M. & Wells. 571).

In this last case, no question appears to have been raised, either by the counsel or the court, as to whether the town clerk would or would not have had the right to take possession of the market, under the *elegit*, if there had been no mortgage, which is the only aspect in which the case has any bearing; and it is not to be regarded as of weight upon a point not inquired into, the more especially as it would seem, from the decision of other cases, that the town clerk could be paid only out of the borough fund (*The Queen v. Ledgard, supra*), and that his proper remedy was to compel payment by *mandamus* (*The Queen v. The Mayor of Stamford*, 6 Q. B. 433; *Jones v. The Mayor &c. of Carmarthen*, 8 M. & Wells. 605; *Tapping on Mandamus*, 93; *Wilcox on Municipal Corporations*, 356).

Chancellor Kent, in declaring that municipal corporations can sue and be sued, remarks that the judicial reports of this country abound with cases of suits against towns in their corporate capacity, for debts and breaches of duty for which they are responsible; but he says nothing as to the mode in which judgments against them in such actions can be enforced (2 Kent, 275, 4th ed.), and the question is one upon which the authorities in this country are by no means agreed, for in some instances it has been held that their property cannot be taken on execution issued upon a judgment against them (*Chicago v. Halsey*, 25 Ill. R. 595); while in others it has been held that it can, or the right to take it has been impliedly recognized (*Crafts v. Elliottsville*, 47 Maine, 141; *Darlington v. The Mayor, supra*).

In the first of these cases (*Chicago v. Halsey*, 25 Ill. R. 595), it was held by the Supreme Court of Illinois, that upon a judgment against a municipal corporation, the corporate prop-

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erty cannot be seized and sold under execution ; that the proper remedy is a *mandamus* to compel a levy of taxes sufficient to enable the corporation to pay the judgment. The Superior Court of Chicago having refused to set aside an execution issued upon a judgment against the city, the Supreme Court of the State, upon appeal, reversed the decision of the court below, and directed it to enter an order quashing the execution. "It is true," says Breese, J., "that by the charter of the city it can sue and be sued, but it is not an inference that if sued, and a judgment passes against it, an ordinary writ of *fiery facias* can issue, under which its corporate property can be seized and sold. Nor is there any necessity for such a writ. On a debt being ascertained by judgment against the city, and a refusal to pay it, a *mandamus* can issue to compel payment, or to compel a levy of taxes sufficient to discharge the judgment;" closing with the remark, "we decide this on principle."

It may be collected, as the result of this examination, that, under an execution upon a judgment against a municipal corporation, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment ; that *if there is no such property*, the remedy is by *mandamus*, to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax ; or if, as is the case in this city, the sanction of the legislature must be obtained, then to compel the corporation to include the amount of the judgment in its budget or petition to the legislature for authority.

Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must, for the same reason, be equally exempt from the operation of the lien law, unless it appears by the law itself that property of this description was meant to be included.

There is nothing in the lien law that would warrant this inference. A lien is given by the act for labor performed or materials furnished, in the building, altering, or repairing of any house or other building, upon the building and the lot of land upon which it stands, to the extent of the right, title, and inter-

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est of the owner at the time when notice of the claim was filed and served. The object of the act was to give mechanics and material men a security for the ultimate enforcement of their claim, by making it, from the time that notice of it is given, a lien or incumbrance upon the property benefited. Where the lien thus attaches, either party may bring the claim to a final determination, and if any thing is ascertained to be due to the claimant, judgment is entered for the amount of it, which judgment may be satisfied by the sale of all the right, title, and interest which the owner had to the property when the notice of the claim was filed and served.

When judgment is recovered in a court of record, it is a lien upon the real estate of the defendant, from the time when the judgment is docketed; and when recovered in courts not of record, it becomes a lien upon the filing of the judgment in the office of the county clerk. In these cases, it is enforced as a lien only from the time of the docketing of the judgment or the filing of the transcript; but the judgment obtained by foreclosure under the lien law may be enforced as a lien against the particular property from the time of the filing and service of notice of the claim, and that constitutes the particular benefit which it was the design of the act to confer upon the laborer or material man, and is the advantage which it gives him over ordinary creditors, as a security for the payment of the judgment he may ultimately obtain. With this exception, the judgment he obtains is, by the express language of the act, "to be enforced in all respects in the same manner as judgments rendered in all other civil actions for the payment of moneys" (Laws of N. Y. 1851, p. 955, § 8). And if judgments recovered in other actions cannot be enforced against a certain kind of property, for the reason that it is exempt from seizure and sale upon grounds of public necessity, neither can a judgment under the lien law, which is a mere foreclosure of a security obtained by the filing and service of notice of a claim (*Cronkright v. Thomson*, 1 E. D. Smith, 661; *Nott's New York Lien Law*, p. 63).

I think the fair construction of the lien law is, that the security contemplated by the law may be obtained upon the building upon which the labor was bestowed or the materials fur-

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nished, and upon the lot of land upon which the building stands, if the land and building can be sold to enforce a judgment in an ordinary civil action, but not otherwise; that we are not justified in holding that the legislature meant that this particular kind of creditor should have a lien upon public edifices, and the right to sell them to satisfy his claim, unless the legislature has expressly said so. The reason which exempts such structures, upon the grounds of public necessity, applies as forcibly in his case as in that of any other judgment creditor, and if all other judgment creditors are precluded from the exercise of such a right, he must be considered precluded also, in the absence of any provision that would warrant us in holding that the legislature designed that his case should be an exception to the operation of a general rule, having its foundation in public necessity.

The erecting and maintaining of school-houses in this city, for public education, is imposed as a duty upon the city by statute. Their erection, maintenance, and government is regulated by numerous statutory provisions. They are by law devoted to a public use, and therefore come within the operation of the rule above considered.

Judgment affirmed.

BRADY, J., concurred.

BARRETT, J., dissented.

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JAMES L. LAMB v. THE CAMDEN AND AMBOY RAILROAD AND
TRANSPORTATION COMPANY.

THE defendants' steamboat was moored to a pier upon which was their railroad depot, containing a large quantity of combustible materials, and the roof of which was coated with tar. The plaintiff's goods, which had been unshipped from the boat, were deposited on the defendant's pier, and during the night, a fire, the immediate cause of which was not proved, broke out upon the steamboat, and in a very short time the boat and depot were in flames, and the plaintiff's goods, with the other contents of the depot, were burned up. Four watchmen were on duty upon the pier at the time, but there was no watchman upon the steamboat. The bills of lading issued by the defendants to the plaintiff contained a stipulation exempting the defendants from liability for loss or injury to the goods by fire.

Held, that the stipulation in the bill of lading, exonerating the defendants from liability for the loss of the goods by fire, did not operate to divest them of their public character as common carriers, but merely to exempt them from liability in such a case, where there was no fault or negligence on their part.

Hence it was not enough for the defendants to show that the plaintiff's goods were destroyed by fire, but the burden of proof was on them to show that their destruction by that element was without any fault on their part, and that they exercised all the care and diligence for the safety of the goods which could be reasonably expected under the circumstances.

Held, that it was not error to charge the jury that if the defendants omitted to take that degree of care which persons of ordinary prudence usually take of such property, under such circumstances, they were liable. Nor was it error to instruct the jury that the omission of the defendants to place a watchman actually on the boat, charged with the duty of guarding her, might be considered by them, on the question of negligence, as this was no more than telling them to determine the question upon all the circumstances of the case.

As a general rule, where the liability of a bailee turns upon the point whether the loss of, or injury to, the property in his custody was owing to the want of ordinary care and diligence on his part, it should, even where there is no conflict as to the facts, be left to the jury to determine, under proper instructions; and their verdict should be regarded as decisive and final upon such a question, unless the case is one warranting the conclusion that they must have been influenced in their verdict by other motives than the consideration of the circumstances arising upon the evidence.

Held further, that it was not error for the court to refuse to charge the jury that the loss must have arisen *solely* from the defendants' negligence. If the neg-

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ligent act or omission of the defendants contributed to the loss, it is not for the court or for the jury to measure in what proportion or degree, if the act or omission was in itself a want of ordinary care and diligence, unless the loss or injury *must* have happened, notwithstanding the act or omission complained of.

The liability of a common carrier continues for a reasonable length of time within which the plaintiff may take his goods away; and what is a reasonable length of time, under the circumstances, is a question for the jury, even where there is no conflict of testimony. This rule is not affected by the provision of the bill of lading that the goods were to be delivered at the carrier's depot.

It seems that where the goods were lost after their arrival at the place of destination by the carrier's want of ordinary care, it is immaterial whether a reasonable time had elapsed within which the owner might have taken them away.

A new trial will not be granted on the ground that incompetent evidence was admitted on the trial, where the evidence was as to facts wholly immaterial to the issues.

An action against a common carrier for the loss of goods undertaken to be carried by him may be founded upon the contract for carriage, or upon the breach of his duty as a carrier; and where negligence is averred and proved, if the complaint is defective in setting up also a contract, the court may, after verdict, amend the complaint so as to conform the pleading to the proof.

An intermediate carrier is entitled to the benefit of any agreement entered into by the owner of the goods carried with the first carrier, qualifying or limiting the common law responsibility, and will be regarded as taking the goods for carriage upon the same conditions and subject to the limitations or exceptions that exist in that agreement. But the mere delivery by such intermediate carrier to the carrier from whom he received the goods, of a receipt containing a condition that the value of the property at the place of shipment shall govern in the event of loss, is not a contract made with the owner, and does not change the common-law rule as to the measure of damages in an action against the intermediate carrier for loss of the goods on his route.

APPEAL by the defendant from a judgment entered on the verdict of a jury.

The action was brought to recover damages for the loss of 138 bales of cotton, part of a larger amount, which had been delivered to the defendants at Philadelphia, to be transported by them to New York. 790 bales of cotton were shipped by the plaintiffs, June 25th, 1864, at Cairo, Illinois, on the Illinois Central Railroad, to be carried by them to Chicago. The Illinois Central Railroad Co. issued its receipts or bills of lading for the cotton, and carried and delivered it to the Union Transportation and Insurance Company, to be transported to New

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York. The latter company issued its receipts or bills of lading therefor. Of this cotton, however, one bale was not accounted for by the Illinois Central Railroad Company, and 789 bales were delivered to the Union Transportation Company, and by that company delivered to the defendants at Philadelphia.

Of the 789 bales received by the defendants, all were delivered by them except 137 bales. These 137 bales were destroyed by fire while in defendants' custody, at their pier, in the city of New York, which fire destroyed defendants' boats, pier, and all the goods therein contained.

This fire occurred on the night of Sunday, July 10th, 1864. Of the cotton so destroyed 59 bales arrived at defendants' pier about midnight of the Saturday before the fire, July 9th, 1864. The balance of the cotton destroyed arrived at defendants' pier on the morning of Saturday before the fire.

The defendants' consignees had four carts working on Saturday up to three o'clock in removing this cotton. They stopped work at three o'clock, because the proprietors of the warehouse refused to receive any more cotton on that day, as they closed at three o'clock on Saturdays.

The bills of lading or receipts above referred to contained exemptions, or exceptions that the carrier was not to be liable in case of loss by fire; and "when losses occur for which the carriers may be responsible, the cost or value of the property at the date of shipment shall govern the settlement of the same."

The court, on the trial, held that these bills or receipts were contracts with the plaintiffs restricting the liability of the carrier, and that the defendants were entitled to the benefit of them. The court, however, held that to avail themselves of this exemption, the defendants must show that the loss was occasioned without negligence or want of ordinary care on their part.

Considerable evidence was taken as to this question of negligence on both sides.

The jury rendered a verdict for the plaintiffs for \$81,618.07, being the value of the cotton, at New York, with interest.

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The various exceptions taken on the trial are stated in the opinion of the court.

The defendants appealed.

Lewis B. Woodruff and *C. F. Sanford*, for the appellants, contended that the exceptions contained in the bills of lading converted the defendants' common-law liability into a qualified responsibility, and cited *Mercantile Mut. Ins. Co. v. Chase* (1 E. D. Smith, 115); *Parsons v. Monteath* (13 Barb. 353); *Moore v. Evans* (14 Barb. 526); *Meyer v. Harnden's Ex. Co.* (24 How. Pr. 290); *Dorr v. New Jersey Steam N. Co.* (4 Sandf. 186; 11 N. Y. 485); *Stoddard v. Long Island R. R. Co.* (5 Sandf. 180); *Mercantile Mut. Ins. Co. v. Calebs* (20 N. Y. 173); *Moriarty v. Harnden's Express* (1 Daly, 227); *Swindler v. Hilliard* (2 Rich. 286); *Camden & Amboy R. R. Co. v. Baldauf* (16 Penn. St. 67); *Bingham v. Rogers* (6 Watts & S. 495); *Beekman v. Shouse* (5 Rawle, 179); *Farmers & Mechanics' Bank v. Champlain Trans. Co.* (23 Verm. 186).

Accordingly, the appellants, under the special contracts as to the transportation of the cotton, were, as to risk of loss by fire, simply ordinary bailees of the cotton for hire; and, having explained the cause of the loss, the proof of negligence or want of due care was upon the owner of the goods, and the owner is not bound to prove affirmatively that the loss was not caused by negligence. (*Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 Barn. & Cress. 322; *Beckman v. Shouse*, 5 Rawle, 179; *Clark v. Spence*, 10 Watts, 335; *Runyon v. Caldwell*, 7 Humph. 134; *Newton v. Pope*, 1 Cowen, 109; *Schmidt v. Blood*, 9 Wend. 268; *Foot v. Storrs*, 2 Barb. 326; *Harrington v. Snyder*, 3 Barb. 380; *Bush v. Miller*, 13 Barb. 489.)

In the following cases the same rule was noticed and approved of: *Clay v. Willan* (1 H. Bl. R. 298); *Levie v. Waterhouse* (1 Price, 280); *Gilbart v. Dale* (5 Ad. & Ellis, 543); *Newstadt v. Adams* (5 Duer, 43); *Logan v. Matthew* (6 Barr, 417); *Moore v. Evans* (14 Barb. 524.) The only cases in which an ordinary bailee for hire has been held bound to prove that the goods intrusted to him were not lost or injured through his

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negligence or default, were where the bailee had refused or failed to account for the loss, or to show that the same was occasioned by one or other of the causes provided for by the contract. This was the distinctive feature, or governing principle, of the decision in each of the following cases: *Logan v. Matthews* (6 Barr, 417); *Skinner v. London, Brighton & South Coast Railway Co.* (2 Eng. L. & E. 360); *Brush v. Miller* (13 Barb. 481); *Fenn v. Timpson* (4 E. D. Smith, 276); *Newstadt v. Adams* (5 Duer, 43); *Arent v. Squire* (1 Daly, 347.)

All the cotton having been safely delivered in New York, at the place where the appellants were bound to deliver the same, the duties of the appellants as carriers, under their contract or otherwise, in reference to the transportation thereof, were in every particular fulfilled and discharged. (*Garside v. Proprietors Trent & Mersey Navigation*, 4 T. R. 581; *Hyde v. Proprietors Trent & Mersey Navigation*, 5 T. R. 398; In re *Webb*, 8 Taunt. 443; *Chickering v. Fowler*, 4 Pick. 371; *Hemphill v. Chenie*, 6 Watts & S. 62; *Van Santvoord v. St. John*, 6 Hill, 157; *Fisk v. Newton*, 1 Denio, 45; *Thomas v. Boston & Providence R. R. Co.* 10 Met. 472; *Lewis v. Western R. R. Co.* 11 Met. 509; *Sawyer v. Joslin*, 20 Verm. 173; *Stone v. Waite*, 31 Maine, 409; *Goold v. Chapin*, 10 Barb. 612; *Farmers & Mechanics' Bank v. Champlain Trans. Co.* 23 Verm. 211; *Smith v. Nashua & Lowell R. Co.* 7 Foster, 86; *Norway Plains Co. v. Boston & Maine R. R. Co.* 1 Gray, 263.)

The appellants insisted that the present case did not fall within the rule of law which governed the decisions in those cases where carriers were held responsible as such, and the goods held not to have been delivered by them until the lapse of a reasonable time after arrival at the terminus. In this case, the delivery having been completed according to the contract, by landing the cotton safely at the depot, the jury were misled by the judge, in his instruction to them, that the appellants' liability as carriers continued after the cotton was so delivered, and until the consignees were enabled to remove the same therefrom.

As to the Measure of Damages.—The bills of lading of the

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cotton contained a special stipulation and condition that "when losses occur, for which the carriers may be *responsible* under the bill of lading, the cost or value of the property at the date of shipment shall govern the settlement of the same." The Judge charged the jury that if the appellants were *responsible* for the loss, the respondents were entitled to recover the market value of the cotton at the city of New York at the time when the same should have been delivered here—the provision in the bill of lading, in the opinion of the Judge, referring only to an *amicable* settlement of a loss, and not being applicable when a settlement was refused, and the party driven to his suit. Further, the Judge charged, that in addition to allowing the market value of the cotton in New York, the jury might or might not, as they thought proper, add to that value, interest from the 7th of August, 1864. Upon a sound construction of the bill of lading, the parties must be held to have themselves assessed the damage which, in the event of a loss occurring, for which the carriers were responsible, the respondents could recover, being the cost of the cotton at the date of shipment. If the construction given by the Judge to this provision in the bill of lading be correct, the carriers, when a loss occurred, would be compelled to waive all questions as to their responsibility; otherwise, they would forfeit all benefit from the stipulation.

The plain import of the stipulation is that the cost or value at Cairo shall govern the *amount* for which the carriers are responsible. The question of responsibility was *alone* left open by the contract.

Luther R. Marsh, for respondent.

I. The burden of proof was on the defendants to show, not only that the loss was occasioned by fire, but also that the fire and the loss were occasioned without any negligence or want of ordinary care on their part.

Assuming that common carriers can restrict their liability by special contract, and that the defendants have done so to some extent by these bills, it is doubtful whether they can so

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restrict it as to relieve themselves from liability for loss resulting from their own negligence or want of ordinary care, and it is certain that to do so, the intention must be clearly expressed in the contract itself. (*Alexander v. Greene*, 7 Hill, 533; *Wells v. The Steam Nav. Co.* 8 N. Y. 375, 380; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Hooper v. Wells*, 5 Am. Law Reg. N. S. 16; *Smith v. N. Y. Central R. Co.* 29 Barb. 132; *Michaels v. N. Y. Central R. Co.* 30 N. Y. 564; *Read v. Spaulding*, 30 N. Y. 630; *Wing v. N. Y. & Erie R. Co.* 1 Hilt. 235.) Whatever cases seem to hold a different rule will be found to be cases where the liability as *common carriers* was entirely out of the question—cases where the goods were delivered under special acceptance to be “transported at the owner’s risk;” or where the carrier was not to be liable beyond a certain amount; or cases of similar character, in all of which the obligations assumed by the carrier were in the whole but those of ordinary bailee, and his liability was to be regulated by the rules which govern that relation. An ordinary bailee who assumes to transport goods under special agreement, at the owner’s risk, acts in quite a different capacity from a common carrier, acting as such, who claims a certain and specific exemption from liability for loss occurring in one particular manner. One is governed by the rules which regulate the responsibility of such bailees; the other by the rules which regulate the liability of common carriers as such. (*Turney v. Wilson*, 7 Yerger, 340; *Whitesides v. Russell*, 8 Watts & Serg. 44; *Singleton v. Hilliard*, 1 Strobhart, Law, 203; *Swindler v. Hilliard*, 2 Richardson, 286; *Roberts v. Riley*, 15 Louisiana Ann. 103; *Slocum v. Fairchild*, 7 Hill, 292; *Parsons v. Monteath*, 13 Barb. 353.)

The rule deduced from the above authorities may be stated thus: Whenever a common carrier seeks to free himself from liability by reason of an exemption created either by the common law or express contract, he must show both that the loss was occasioned by the cause mentioned in the exemption, and that he was free from all fault, negligence, or want of ordinary care. The burden of proving both propositions is on the carrier.

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II. Even if the defendants sustained the relation of ordinary bailees for hire, they were nevertheless bound to show, in this particular case, that the loss did not occur through their negligence. The meagerness of authority probably results from the fact that this question is seldom brought squarely before the court; that in most cases the evidence as to excuse for nondelivery and as to want of care is coincident, and when the bailee attempts to show his excuse for nondelivery, he necessarily brings up the question of negligence, and the court has to decide that question on the evidence, without regard to the question of burden of proof. (*Platt v. Hibbard*, 7 Cowen, 497; *Foot v. Storrs*, 2 Barb. 327; *Harrington v. Snyder*, 3 Barb. 380.) See *Beardslee v. Richardson* (11 Wend. 25, 27); *Logan v. Matthews* (6 Barr, 417.)

This question was well and elaborately considered in the case of *Swindler v. Hilliard* (2 Richardson, 286); and in this court, in *Arent v. Squire* (1 Daly, 347.)

III. The defendants were liable for ordinary negligence, or want of ordinary care, provided such negligence or want of care contributed to the loss, because the receipts or bills of lading do not, in terms, exempt them from liability for negligence or want of ordinary care. (*Alexander v. Greene*, 7 Hill, 533; *Wells v. Steam Nav. Co.* 8 N. Y. 375; *Smith v. N. Y. Central R. Co.* 29 Barb. 132; *Hooper v. Wells*, 5 Am. Law. Reg. N. S. 16; *Sager v. Portsmouth &c. R. Co.* 31 Maine, 228; *Swindler v. Hilliard*, 2 Richardson, 286.)

IV. The plaintiff's consignees had a reasonable time, after notice of its arrival, to remove the cotton, and until such time had elapsed the liability of defendants continued. What was such reasonable time, was a question solely for the jury, in view of all the circumstances of the case. (*Price v. Powell*, 3 N. Y. 122; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Barclay v. Clyde*, 2 E. D. Smith, 95; *Hill v. Humphreys*, 5 Watts & Serg. 123.) If their liability as common carriers had ceased, the defendants were liable, as depositaries or warehousemen, for want of ordinary care. (*Clendaniel v. Tuckerman*, 17 Barb. 184; *Goold v. Chapin*, 20 N. Y. 259.)

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V. The measure of damages was the value of the cotton burned at New York, the place where it should have been delivered. To this amount the jury may, if they see fit, add interest, which is a matter solely in their discretion. (*Watkinson v. Laughton*, 8 Johns. 213; *Amory v. McGregor*, 15 Johns. 24; *Kent v. Hudson River R. Co.* 22 Barb. 278; *Medbury v. N. Y. & Erie R. Co.* 26 Barb. 564; *Van Winkle v. U. S. Mail Steamship Co.* 37 Barb. 122, 123; *Marshall v. N. Y. Central R. Co.* 45 Barb. 502.)

VI. The bills of lading or receipts do not constitute contracts or agreements binding on the plaintiffs, and exempting the carriers as therein mentioned, because there is no proof of assent to their terms by the plaintiffs, and such assent cannot be implied from the instruments themselves, and the burden of proving such assent is on the carrier.

Whatever may be the effect of these receipts and bills, the defendants in this action cannot take advantage of them. (1.) Because the receipts issued by the Illinois Central Railroad are confined in their effect to that road. (2.) Because the receipts issued by the Union Transportation Company were not in any sense authorized by the plaintiffs, or received by them, or any authorized agents of theirs. (3.) Because the defendants, being a monopoly, should not be allowed to restrict their common-law liability.

DALY, F. J.—The defendants, by their special agreement, qualified their liability as common carriers in two particulars.

First. They were not to be responsible for a loss by fire.

Second. If responsible for loss, the cost or value of the property at the time of shipment was to govern in the settlement of the loss. They did not by this agreement divest themselves of their public character as common carriers, but the effect of it was simply to exempt them from liability, if the property should be destroyed by fire, without fault or negligence on their part (*Swindler v. Hilliard*, 2 Richardson R. 286; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344).

It was not enough for the defendants, in their exoneration,

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to prove that the property was destroyed by fire, but they were bound to go further, and show that its destruction by that element was without any fault on their part. This involved the necessity of showing how the fire and consequent destruction of property occurred, and what means, if any, were taken to prevent it or avert its effects. The owner is not to be presumed to know what was done by the carrier or his agents in the care and preservation of the property, but the carrier knows, or ought to know, as he has peculiarly within his power the means of knowledge, and it is for him to show it. The responsibility should be upon the one who can most easily discharge it; and it is more reasonable to require the carrier to prove, in his examination, that due care was exercised, than to impose upon the owner the obligation of proving the want of it (*Singleton v. Hilliard*, 1 Strobhart, Law, 203; *Hays v. Kennedy*, 3 Grant (Penn.), 351; *Swindler v. Hilliard*, *supra*; *Arent v. Squire*, 1 Daly, 347; *Parsons v. Monteath*, 13 Barb. 354; *Tardos v. Toulon*, 14 La. An. 229; *Smith v. New York Central Railroad*, 43 Barb. 229). "The general rule undoubtedly is," says Mr. Justice Johnson, in the case last above cited, "that the burden of proof is always upon the party who asserts the existence of any fact which infers legal responsibility. But the exception is equally well established, that in every case the *onus probandi* lies upon the party who is interested to support his case by a particular fact which lies more particularly within his knowledge, or of which he must be supposed to be cognizant." The ruling of the court, therefore, that the burden of proof was upon the defendants to show that the destruction of the cotton by fire was not caused by negligence on their part, was correct, and the exception was not well taken. The fire originated in a steamboat used by the defendants in the transportation of freight. The steamer was lying at the wharf upon which the defendants' depot for the reception of freight was erected, and the fire, when discovered, had obtained such headway, and its course was so rapid, owing to the prevalence of a high wind, that it was communicated to the depot, which, with its contents, was destroyed, the means resorted to by the defendants' agents and others, to arrest the progress of the fire proving ineffectual. It did not

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appear upon the trial how the fire originated in the steamboat, and it may be that the defendants did not know, or that they gave all the proof in explanation of it that it was in their power to offer; but this would not suffice, if the fire might have been prevented by that degree of care on their part which ought to have been exercised to guard against the occurrence of such accidents.

Pothier, in his *Traité du Contrat de Louage* (§§ 193, 194), after remarking that the occupant of a house is, with respect to its preservation, answerable, not only for his own negligence, but also for that of his family, and for the servants and work-people whom he employs there, says that as a fire ordinarily happens in a house through the fault of the persons who live in it, it may fairly be presumed, when one occurs, that it was owing to the fault of the occupier or his servants, and he is therefore held to make good the loss, unless he can show that it arose from inevitable accident (*cas fortuit*), or was communicated from another building—a rule that would be quite as applicable to a carrier or any other bailee for hire as to the lessor of a house. If the carrier cannot explain how the fire occurred which destroyed the property entrusted to his charge, it is quite as consonant with justice to presume that it must have arisen through the negligence or want of proper care of himself or of his agents as to presume that it was the result of inevitable accident. Or if no presumption is to be indulged in where the cause of the fire is not or cannot be explained, it may at least be said that it is incumbent upon the carrier to show that he exercised all the care and diligence for the safety of the property that could be reasonably expected of him under the circumstances.

The jury in this case must be regarded as having found that the defendants did not exercise that degree of care which was required of them to guard against such accidents. The judge told them that the burden was upon the defendants to satisfy them that the loss by fire was not occasioned by negligence on their part; that if the defendants omitted to take that degree of care which persons of ordinary prudence would naturally take of such property under such circumstances, and if that occasioned or contributed to the loss, the defendants were

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liable; to which the defendants excepted. This was substantially instructing the jury that the defendants were bound to exercise ordinary care and diligence (Story on Bailments, § 11; Edwards on Bailments, 3), which is the law in respect to bailees for hire; and they did not exercise it, if the want of it occasioned or contributed to the loss. The exception, therefore, to this part of the judge's charge was not well taken. The jury, after having retired to deliberate, sent the following question in writing to the judge: "If we are satisfied the proper precaution was not taken to prevent fire on board, through the neglect to place a watchman there, are we to find for the plaintiffs for the whole amount?" Upon which the judge instructed them that "the omission to place a watchman actually on the boat, specially charged with the duty of guarding her, might be considered by the jury on the question of negligence in the case," to which instruction the defendants excepted.

It was no error on the part of the judge to tell the jury that they might take this circumstance into consideration, for it was for the jury to determine upon all the circumstances whether there was a want of ordinary care and diligence or not.

Ordinary care is generally defined by the text-writers to be the common prudence which men of business, or heads of families, ordinarily take of their own property, or usually exhibit in the management of their own affairs. But the intrinsic difficulty of reducing what it is within the limits of a definition, is such that it becomes, as Judge Story has remarked in his work upon Bailments (§ 11), "less a matter of law than of fact." In nearly every instance where the question arises, it involves the question, what should or should not have been done by the party upon whom the obligation was imposed; and this is usually a question that can be properly determined only by a consideration of all the circumstances, and one that a jury is generally quite as competent to pass upon as a court. The rule that the bailee must take the same care as men of common prudence usually take of their own property, or exhibit in the management of their own

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affairs, is to a certain extent a guide, but it is a very vague one. It is a test founded upon that kind of knowledge or experience which is common to all mankind, and of which the twelve men in the jury-box may have as much, or more, than the judge. In *Crook v. Jadis* (5 Barn. & Ad. 909), where the question was whether the defendant was answerable or not for gross negligence, Taunton, J., said: "I cannot estimate the degree of care which a prudent man should take." In *Vaughan v. Menlove* (3 Bing. N. C. 468), where the same question arose, Chief Justice Tindal said: "The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question." In *Storer v. Gowen* (18 Maine, 174), where there was the same question, it was held that it was the province of the jury, and not of the court, to pass upon it; and in *Whitney v. Lee* (8 Met. 91), Chief Justice Shaw held that as it is difficult to mark the lines of distinction between different degrees of negligence, so as to show precisely where the one begins and the other ends, therefore, by the common law, it is left to the jury to say, under the circumstances, whether the particular case is under the one or the other. These, it is true, are cases where the question involved was not the existence of negligence, but the degree of it; but the reasons upon which they are founded apply equally, in my opinion, in a case where the existence of negligence depends upon the question whether the degree of care was taken which men of common prudence take of their own property. In a recent case (*Philadelphia Railroad Co. v. Spearn*, 47 Penn. St. 300), the court held that there is "no absolute rule as to what constitutes negligence; conduct which might be so termed in one case being in another considered as ordinary care; that it is therefore always a question of fact for the jury, under the instruction of the court, as to the relative degree of care, or the want of it, growing out of the circumstances and conduct of the parties." And Angel, in his work on Carriers (§§ 51, 184), gives it as the result of his examination of the authorities, that in most cases the question of ordinary negligence

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is more a question of fact to be determined by the jury than of law. The opinion of Judges Johnson and Mason, in the respective cases of *Ireland v. Oswego Railroad Co.* (13 N. Y. 533), and *Keller v. New York Central Railroad Co.* (24 How. Pr. 177), were to the effect that what constitutes negligence is an inference of the mind from the facts and circumstances of the case; that, as minds are differently constituted, the inference from a given state of facts will not always be the same; and that, therefore, though all the witnesses may agree in their statement, the true course is to leave the determination of the question to the jury, under proper instruction, unless the facts are so clear and decided that the inference is irreestible. "If it is necessary," says Judge Selden, in *Bernhardt v. Rensselaer & Saratoga Railroad Co.* (23 How. Pr. 168), "to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved: this involving, as it generally must, more or less of conjecture, can only be settled by a jury;" and Judge Porter, in *Ernst v. Hudson River Railroad Co.* (35 N. Y. 40), remarking upon the liability of judges to differ, and pointing to the fact that, even in the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed, pertinently asks if judges "are less liable to err than jurors on questions of pure fact pertaining to the ordinary affairs of life." "Our law," he continues, "is framed upon the theory that upon such questions the citizen can rely with more security on the concurrent judgment of twelve jurors than on the majority vote of a divided bench. Unanimity is not required in our decisions upon questions of law. It is otherwise with jurors charged with the determination of questions of fact; and such questions should not be withheld from the usual arbitration, unless the evidence leads so clearly to one result, that there is no room for honest difference between intelligent and upright men."

From the very nature, therefore, of the subject-matter; from the difficulty of a judge applying to the circumstances such a test as the care which men of common prudence ordinarily exhibit, and determining upon a given state of facts as

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matter of law, that it was exercised or that it was not, in which his judgment may be no better than that of the men who are sitting upon the jury; and from the fact that where such a test is to be applied, every case must be determined more or less upon its own circumstances, there can be no better course than to leave such a question to be settled by the jury, the united judgment of the twelve men who compose the jury being as certain and as satisfactory a mode of determining it as for the court to undertake to work it out upon the facts by a course of legal reasoning. It may be that a judge can say upon the facts proved that there is not one which could have any tendency to show the want of that care which the law demands, or that the failure to exercise it has been so conclusively shown that there is nothing which the jury could consider; "but such instances," as was said by Judge Selden, in *Bernhardt v. Rensselaer & Saratoga Railroad Co. (supra)*, "must be rare;" and that they are so has been the result of my observation, having had a long experience in the trial of actions involving such questions. As a general rule, therefore, where the liability of the bailee turns upon the point whether the loss or injury were owing to the want of ordinary care and diligence on his part, it should, even where there is no conflict as to the facts, be left to the jury to determine, giving them the rule above referred to as their guide; and their verdict should be regarded as decisive and final upon such a question, unless the case is one warranting the conclusion that they must have been influenced in their verdict by other motives than the consideration of the circumstances arising upon the evidence.

When the fire was discovered, the smoke was issuing from the guards of the boat, and came out through a grating upon the forward deck, near one of the boilers, and in the vicinity of the fire-room. When the engineer came upon the deck, the fire was coming out, as he testified, through a small rod, and had broken out through a small hole alongside the boiler. He cut a hole in the deck with an axe at the deck rod, a place where the fire came from, about fifteen feet forward of the boiler, when instantly the flames rushed up to a height of nearly six feet, and in ten minutes the deck was on fire. In five min-

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utes the pier caught, and in less than half an hour the boat and the depot were in flames, the fire running all over, in the language of one of the witnesses, "like a tinder-box, so that water had no effect upon it." The defendants showed satisfactorily that it did not originate in the fire-room, and also that the forward boiler had been washed out and the fire in the furnace extinguished at least twelve hours before the discovery of the fire. It was discovered at midnight, between half-past twelve and one o'clock, the engineers, hands, and all on board being at the time asleep in their beds. The assistant-engineer was below, in the vicinity of the fire-room, as late as nine o'clock in the evening, and there was no indication there at that time, by sight or smell, of the existence of fire; but, in little more than three hours after, it had occurred, and attained to such a magnitude as to be beyond control.

It would not be an unreasonable assumption on the part of the jury to conclude upon this state of facts that the fire originated through the negligence of some one on board the steam-boat. There was no indication of it at nine o'clock in the evening in the vicinity from whence it was proceeding when discovered, and where it probably originated; and no person was shown to have been on board the boat during the evening but those attached to the vessel.

But there is no occasion to dwell upon this view of the case, as the jury have very clearly indicated by the point upon which they requested instruction, and by their verdict, that in their opinion there was a want of ordinary care and diligence on the part of the defendants in not maintaining a watch throughout the boat during the night, to guard against accidents by fire, and that if that had been done the fire would not have occurred, or its extending could have been prevented. It was shown that the boat—the running of which was only temporarily suspended during Sunday—was lying close against the pier, upon which was the depot, containing a large quantity of combustible materials, such as cotton, hemp, barrels of oil, of whiskey and of wine, boxes of candles, tierces of lard, &c., the roof of the building being covered with, or having so much tar upon it, that, in the language of one of defendants' witnesses,

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"it went like a match." The defendants kept four night watchmen upon the pier to protect the property from theft and to guard against accidents by fire. They were all on duty when the fire was discovered, and one of them had charge of the boat, but he did not go below the deck, his duty being to watch the freight upon the boat and look after her lines and tackle. It was his practice to go around every hour, and sometimes more frequently, and if he heard any noise, or anything which attracted his attention, to go on board of the boat. The precautions taken to guard against accidents by fire upon the pier seem to have been ample, but the jury were evidently of opinion that they were not sufficient to guard against it on board the boat; and as the boat was lying close to a depot in which there was a very large quantity of combustible materials, it was certainly, as the event proved, leaving the depot in imminent peril if the boat should take fire at night when all on board of her had retired to rest. A steamboat in which fire is used as the means of propelling her, and is in use more or less for the convenience and wants of those who are employed upon and live on board of her, may require greater watchfulness to guard against accidents of this nature than was bestowed upon this occasion; at least, so the jury thought, and we cannot, as matter of law, say that they erred in coming to that conclusion. In view of the peril, in view of the boat's taking fire, of the danger in that event, to which the depot was exposed, from the quantity of tar upon the roof, and the combustible nature of the goods stored in it, it was evidently, in the judgment of the jury, required, in the exercise of ordinary care and diligence on the part of the defendants, that they should have kept up a watch throughout the boat during the night, or at least after the officers and men had retired to rest; and of the propriety or necessity of this, as an act of common prudence on the part of the defendants under the circumstances, for the preservation and safety of the property, the twelve men who sat upon the jury were as competent to judge as this court could be.

"Diligence," says Story, "is usually proportioned to the degree of danger of loss; the danger is, in different states of society, compounded of very different elements, and the custom of trade

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and the course of business have an important influence" (Story on Bailments, § 14). The judge, in his instructions to the jury, brought the question down to this standard, by telling them that if the defendants omitted to take that degree of care which persons of ordinary prudence would usually take of *such property, under such circumstances*, the defendants were liable. This was certainly all that the defendants could ask as matter of law from the court, and the united judgment of the jury that they did not do this should be treated by us as decisive.

It is claimed that the judge erred in telling the jury that if the omission of the defendants to exercise ordinary care and diligence contributed to the loss, the defendants were liable. This was excepted to, but the exception was not well taken. I have already stated that the defendants did not, by their special agreement, divest themselves of their public character as common carriers, for their extraordinary liability remained, except in the case of a loss by fire.

The effect of the stipulation they entered into was simply to put that peril upon the same footing as a loss by the act of God or the public enemies, from which the law exempts them; and the same rule should be applied that is applied in that case—that, to entitle him to the exemption, the carrier must be himself without fault (*Read v. Sparulding*, 30 N. Y. 630). The act of negligence may have been remote, but, if it contributed to the injury, he is answerable. "To avail himself of such exemption," says Davies, J., in the case above cited, "he must show that he was free from fault at the time." "His act or neglect," says Woodruff, J., in the same case (5 Bosw. 408), "must not *concur and contribute* to the injury." "No wrong-doer," says Tindal, C. J., in *Davis v. Garrett* (6 Bing. 716), "can be allowed to *apportion* or *qualify* his own wrong."

If, therefore, the negligent act or omission of the defendants, in the language of the judge, contributed to the loss, it was not for the court or the jury to measure in what proportion or degree, if the act or omission was in itself a want of ordinary care and diligence; unless, as was said by Tindal, C. J., in the case above cited, the loss or injury *must* have happened, notwithstanding the act or omission complained of. The cases upon

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which the defendants' counsel rely for the proposition that the loss must have arisen *solely* from the defendants' negligence, are cases where the point involved was co-operating or contributing negligence on the part of the plaintiffs, and do not apply.

The liability of the defendants as carriers continued after the cotton was deposited in the depot, until a reasonable length of time was afforded to enable the plaintiffs to take it away; and what was a reasonable length of time, under the circumstances, was a question for the jury. (*Congar v. Galena &c. Railroad Co.* 17 Wis. 477; *Jackson v. Sacramento &c. Railroad Co.* 23 Cal. 268; *Morris &c. Railroad Co. v. Ayres*, 5 Dutch. N. J. 393; *New Albany Railroad Co. v. Campbell*, 12 Ind. 55; *Garside v. Trent Nav. Co.* 4 T. R. 581; *Angel on Carriers*, §§ 284, 287, 303.) This rule was in no way affected by the provision in the contract that the cotton was to be delivered at the defendants' depot; for a delivery there, upon notice to the plaintiffs, would have sufficed, if no such stipulation had been made (*Thomas v. Boston &c. Railroad Co.* 10 Met. 472).

In my judgment, the question, upon which so much evidence has been given upon the trial, and which has been so elaborately discussed upon the argument, whether or not a reasonable length of time had elapsed, is not material, if the destruction of the property by fire was attributable to the want of ordinary care and diligence on the part of the defendants. Fifty-nine bales arrived on Saturday, of which no notice was given to the consignees or opportunity afforded them to remove them; and as respects the other seventy-nine bales, which were left over after three o'clock on Saturday afternoon for the plaintiff's convenience, the defendants were, under the circumstances, to be regarded as bailees, bound to the exercise of ordinary care and diligence.

In *Thomas v. Boston &c. Railroad Co.* (10 Metc. 472), a carefully considered case, the goods had, as in the present case, been partially taken away, and the residue was left in the depot for the plaintiff's convenience. No agreement was made for the storage of what was left, nor any compensation paid for taking care of it, the sum paid being the freight for its carriage,

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which was payable at the delivery of the goods, upon the arrival of the cars. Upon this state of facts, a portion of the goods left having been lost, the court held that the relation of the defendants as common carriers had ceased, and that they were responsible only for the want of ordinary care and diligence in the custody and safe-keeping of the goods. (See, to the same effect, *Roth v. Buffalo &c. Railroad Co.* 34 N. Y. 553, 554; and *Clendaniel v. Tuckerman*, 17 Barb. 189, 190.)

But if the question of reasonable time was material, there was nothing in the ruling of the court of which the defendants have a right to complain.

An exception was taken as to the propriety of leaving it to the jury to determine whether a reasonable length of time had elapsed or not, upon the ground that, as there was no conflict upon the evidence, it was to be decided by the court purely as a question of law. It was said by Judge Smith, in *Roth v. Buffalo &c. Railroad Co.* (*supra*), that when there is no dispute as to the facts, the question is purely one of law, and that the court should decide it; but the authorities quoted by the judge do not sustain that proposition in the broad terms in which he has laid it down. They relate mainly to the question of what is reasonable notice of the dishonor of a bill, which, when the facts are undisputed, is a question of law, from the necessity of having some fixed legal standard in respect to bills and promissory notes, that commercial men may know the law and be enabled to protect themselves (*Bryden v. Bryden*, 11 John. 187).

But what is a reasonable time within which goods deliverable at the warehouse or depot of the carrier must be taken away, is a question more or less dependent upon circumstances—such as the nature of the goods, the mode of doing business, as well as other considerations, upon which men equally intelligent may come to different conclusions; making it especially appropriate that such questions, as a general rule, should be determined by the jury, and not by the court. “The question,” says Angel, “of what is requisite to constitute a competent delivery by the carrier, or such a delivery as will determine the transit and dissolve his liability, in a great measure is left to

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the jury to determine" (Angel on Carriers, § 282). What is a reasonable length of time in cases of demurrage, is determined upon all the circumstances legitimately bearing upon the case, and is a question for the jury (*Cross v. Beard*, 26 N. Y. 89, 92). A case may arise in which the court can say at once, as matter of law, that more than a reasonable length of time has elapsed, as in *Nudd v. Wells* (11 Wis. R. 407), where a package was to be conveyed by a carrier from Boston to Milwaukee, and a year had gone by without his delivering it; but in the great majority of cases, the question should be left to be determined by the jury, and the present is not one which should be an exception to such a rule.

Several exceptions were taken to what the judge said to the jury upon the question of reasonable time. After reading the passages excepted to, I do not think that the judge meant that any of the circumstances to which he referred were to be taken by the jury as conclusive in law upon the question as to what would or would not be a reasonable time, or that he meant to give them any positive instruction founded upon the circumstances upon which he commented. If I am mistaken in this respect, and his language is capable of a different construction, and the effect of it was to take away from the jury the consideration of any of the circumstances and dispose of them as questions of law, then it is sufficient to say that the effect of this part of his charge was entirely obviated (*Stoddard v. Long Island Railroad Co.* 5 Sandf. 189), and made nugatory by his response to the question which was afterwards submitted to him in writing by the jury: "Does the law specify any period as a reasonable time, or is it fixed by custom?" To which he answered, "Neither the law nor any custom proven in this case defines what is a reasonable time. The jury must determine *that as a fact from all the circumstances* of this particular case." The determination of it by the jury as a fact necessarily excluded the consideration of any circumstances as matter of law, and left the disposition of the whole question entirely to the jury.

The remaining questions relate to the admission and rejection of evidence and to the measure of damages. The plaintiff

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was allowed to read the charter of the defendants, from the Session Laws of the State of New Jersey, to show that the defendants had the exclusive right of transportation, by railroad, across the State of New Jersey, for the purpose of raising the point that the defendants could make no contract in derogation of their common-law liability, and because it bore upon the question of delivery in the city of New York. There was no question in the case respecting a delivery in New York, except so far as it was involved in the question whether a reasonable length of time had or had not elapsed for the consignees to remove the cotton from the depot; a question, as I have already said, which was immaterial, if the destruction of the cotton was owing to the want of ordinary care and diligence on the part of the defendants; for, if that was exercised, the defendants were not liable at all; and as the court ruled against the plaintiff upon the other ground, holding that the defendants could limit their liability, the reception of the testimony could have no bearing upon any of the points on which the defendants relied for their defence. The charter is not printed in the case, and therefore we cannot say that there was anything in it which necessarily had, or which possibly might have had, an effect upon the minds of the jury, and influenced their verdict. The extreme length to which our courts formerly carried the practice of granting new trials, where incompetent evidence was admitted, which might, though it probably did not, affect the verdict (*Underhill v. New York & Harlem Railroad Co.* 21 Barb. 489; *Farmers' Bank v. Whinfield*, 24 Wend. 427), has operated very injuriously, and tended more to delay and obstruct than to aid the administration of justice. Of late years the courts of this and other States have shown a disposition to depart from this rigid and very technical rule. If evidence was rejected that ought to have been received, or evidence received that ought to have been rejected, the defendants are entitled to a new trial, is, says Wright, J., in *Forrest v. Forrest* (25 N. Y. 510), "hardly the rule now in a court of law; for, latterly, even these courts undertake to judge for themselves of the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that

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the verdict would have been the same with or without such evidence, they have refused a new trial."

It was wholly immaterial what instruction the defendants had given to their agents. The question was, what was done by these agents? for, if the agents had neglected to follow these instructions, the defendants would still have been answerable, and if the agents fulfilled them, it was an easy matter to prove what they did. This the defendants were allowed to show, and did show very fully. The watchmen testified what was the nature of their duties, and what they did in the discharge of them, which was all that was material. As all the other exceptions taken to the reception or rejection of evidence, save one, are not mentioned in the defendants' points, and were not referred to upon the argument, we may assume that they are abandoned and need not be reviewed.

The remaining one relates to the reception of evidence as to the value of the cotton in New York, the place of delivery, and may be reviewed in connection with the rule which the judge laid down in his charge as to the measure of damages. He told the jury that the provision in the contract that the value of the property at the date of the shipment should govern in the settlement of the loss, referred to an amicable settlement of it; that it did not apply where a settlement is refused and the party is driven to his suit; and that the plaintiff, if he recovered, was entitled to the market value of the cotton in the city of New York at the time when it should have been delivered. This, I think, was erroneous. There is nothing in the language of the contract that would warrant the putting of such a qualification upon it. It refers to the occurrence of losses for which the defendants *may be responsible*. The settlement—that is, the adjustment and payment of the loss—is made dependent upon the question whether they are responsible for it or not, and the contract does not provide how that is to be ascertained. If it is in doubt, or in dispute, and the parties cannot agree, it can be determined only by the decision of a court of law, or by a mutual agreement to refer it to arbitration; but, under the construction given by the judge, the defendants, when a loss occurred, would be compelled to waive all question as to their

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responsibility, or lose the benefit of the stipulation which they had made. The language used will not bear such an interpretation. The obvious meaning is: when it is ascertained that they are responsible for a loss that has occurred, which, after inquiry, they may satisfy themselves is the fact, and admit, or which, doubting or disputing, they may leave to be decided by a resort to the ordinary tribunals, that they are to be answerable only for the value of the cotton at the date of its shipment. It is said in the case, that the cost of the cotton when it was shipped was proved by the bills of the purchaser which are in evidence. If the plaintiff, therefore, so elects, the verdict may be reduced to the value of the cotton at the time of shipment, and affirmed for that amount; if not, a new trial will have to be ordered.

BRADY, J.—The defendants are not, by the contract of carriage, to be responsible for a loss by fire, unless it can be shown that it resulted from their negligence or want of care. This condition of liability was enforced in terms on the trial. The defendants were held not to be responsible, unless it satisfactorily appeared that they were guilty of negligence by which the loss was occasioned. Whether the plaintiff is to make out a *prima facie* case in the first instance, is not stated by the contract itself, and the natural order of proof would be for the plaintiff to show the delivery to the carrier, and his failure to carry and deliver as undertaken by him, and by way of answer to any explanation of the loss by him, to further show that it resulted from his negligence, notwithstanding the explanation.

There is nothing in the contract hostile to this form of procedure, or in conflict with it. The carrier is to be liable only for negligence resulting in loss when the loss is occasioned by fire. This is a condition imposed by him; this the limit within which he restricts the common-law liability which would otherwise exist; and when fairly considered, with reference to that common-law liability thus restricted, it means: "Upon a fair and full consideration of all the facts attending the loss, if it appears that I was negligent, and that such negligence resulted in the destruction of your property, I will pay you the damages to be ascertained as agreed upon."

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It would be a severe exercise of judicial power to hold that the consignor must give evidence, not only of the cause of the loss, but the details attending it, and be also required to establish from such details the want of such care on the part of the carrier as he was called upon to exercise under his engagement in respect to the property carried. Such a duty should not be imposed, unless there can be no doubt that such was the intention of the parties, and for the reasons—

1st. That the circumstances attending the loss are more within the knowledge of the carrier, and information on the subject more accessible to him than to the consignor; and,

2d. Because the carrier is *prima facie* liable if he failed to deliver, and any limited responsibility being for his especial benefit, he should have the burden of bringing the loss complained of within the exception to his general liability.

The defendants in this case were required, in answer to the plaintiff's demand, to bring themselves within their excepted liability, and this was a proper construction of the terms of carriage. I agree with Judge Daly, therefore, in his conclusions upon that branch of the case.

It must be said, in addition, however, that the defendants did not rest upon their proposition that the plaintiff must show them guilty of negligence. They excepted to the denial of the motion to dismiss the complaint, it is true, but they proceeded, nevertheless, to show the cause of the fire, and all the circumstances calculated to relieve them from the charge or suspicion of negligence. The plaintiff responded to the case made by such evidence, and the issue on that subject was fairly considered, and passed upon adversely to them. The proof having thus been given on both sides, the refusal of the judge at the trial to compel the plaintiff to establish a *prima facie* case of negligence against the defendants resulted, and is to be regarded merely, as an inversion of the order of proof, which could not operate to the prejudice of the defendants.

The circumstances under which the fire took place, its cause and consequence, as already suggested, must be supposed to have been more within the knowledge of the defendants than the plaintiff, and the evidence on the trial shows that such supposition was entirely justifiable. Such facts and circumstances

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would necessarily present the defence, or the conclusion based upon them, if proper, that the defendants were not guilty of negligence. It may be said in answer to this view that the plaintiff might not have been able to show that the defendants were guilty of negligence in opening his case; but the fact that he rebutted the defendant's case made on that subject, and was allowed to go to the jury upon the answer made to it, shows that such a conclusion could not be properly entertained. We have the whole case before us, and it does not appear that the inversion of the order of proof, assuming such an incident to have occurred, prejudiced the defendants in any manner. They had the opportunity to present their case fully, and seem to have done so, and the jury found against them. For these reasons, and those assigned by Judge Daly on the other questions considered by him, the judgment should be affirmed.

[Subsequently, upon a reargument being had upon the question of the rule as to the measure of damages under the contract, the court reconsidered its decision on that question, with the following opinion.]

DALY, F. J.—The receipt or bill of lading which the Illinois Central Railroad Company gave at Cairo is the written evidence of the contract which that company made for the transportation of the cotton, to which may be added the statement of the plaintiff, Lamb, that the agent of that company told him that it would take the cotton for two dollars per hundred pounds, and the statement of the agent himself that he made the bargain for the transportation of the cotton from Cairo to New York with the plaintiffs. The bill of lading acknowledges the receipt of the cotton by the company, consigned to James Warrack, agent, Chicago, as marked and described in the margin, and in the margin it is consigned to Sawyer, Wallace & Co., New York; and after the printed word "freight" there is in the margin this entry: "Through rate \$2 per 100 lbs.;" by which we understand through to New York, that being the place of destination.

In the body of the bill of lading it is provided that the company are not to be responsible for loss by fire, unless it occurs

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through the negligence of their agents; and further, that it is especially understood that for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof; it being understood that the said Illinois Central Railroad Company assumes no other responsibility for their safety or safe carriage than may be incurred on its own road.

If the word "packages" may be understood as embracing cotton bales, which I think it may, as cotton is among the articles previously referred to, and one of the definitions of "package" by Webster, is a "bale," and this bill of lading, with its qualification of the carrier's responsibility, is to be regarded as expressing the contract which the plaintiffs or their agents entered into with the Illinois Central Railroad Company, then, in my judgment, it is very plain that the responsibility of that company as common carriers ceased when they had transported the cotton over their own road to Chicago and had delivered it into the custody of a connecting line to transport it further upon its route to its destination at New York (*Detroit &c. Railway v. Farmers' Bank*, 20 Wis. 122; *Cincinnati &c. Railway v. Spratt*, 2 Duvall, 4; *Nutting v. Conn. River Railroad*, 1 Gray, 502; *Hunt v. N. Y. & E. Railway*, 1 Hilton, 228; *Penn. &c. Railway v. Schwarzenberger*, 45 Penn. St. 208; *Converse v. Norwich &c. Co.* 33 Conn. 166; *Farmers' Bank v. Champlain &c. Co.* 18 Vt. 140; 23 *id.* 209; *Jennison v. Camden &c. Railway*, 4 Am. Law. Reg. 234; *Fenner v. Buffalo &c. Railway*, 46 Barb. 103).

Where the carrier to whom the property is delivered by the owner for transportation to a point beyond that carrier's route, receives, or contracts to receive, the entire freight, he undertakes for its carriage and delivery at the place of destination, and the subordinate carriers are to be regarded as his agents. Having received, or contracted to receive, the whole reward, he is bound to perform the whole service, or, rather, to see that it is performed, at the peril of his liability, as a common carrier, in the event of loss. (*Dillon v. N. Y. & E. Railway*, 1 Hilton, 234; *Mercantile Mutual Ins. Co. v. Chase*, 1 E. D. Smith, 115.)

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If the freight for the entire route is reckoned in one sum, or a receipt is given for the entire route, or the rate for the whole route is agreed upon and fixed by the carrier who receives the property from the owner, it is *prima facie* evidence of an agreement to deliver it at the ultimate place of destination, but like any other presumption, may be overcome by proof that that was not the agreement (*Krender v. Woolcott*, 1 Hilton, 227; *Angle v. Mississippi Railway*, 9 Iowa, 487; *Crouch v. Great Western Railway*, 2 H. & N. 491; *Peet v. Chicago &c. Railway*, 19 Wis. 118; *Weed v. Saratoga &c. Railroad Co.* 19 Wend. 535; *Kyle v. Laurens Railway*, 10 Rich. Law (S. C.) 382; *Wilcox v. Parmlee*, 2 Sandf. S. C. R. 610).

In this case, the rate for the whole route was agreed upon by the Illinois Central Railroad Company, but at the same time it was expressly provided in the same instrument that they were not to be responsible for the safety of the cotton beyond the limits of their own road. It is upon the bill of lading alone that the plaintiffs rely for the conclusion that the Illinois Central Railroad Company contracted for the carriage of the cotton to New York, as it contained the names of the consignees there, and the words "through rate \$2.00 per 100 lbs." But if the plaintiffs rely upon the bill of lading as the evidence of the contract, they cannot adopt one clause of it and reject the rest. They must take it altogether. It is to be used as one instrument, and the contract is to be gathered from all that is contained in it; and if they reject the bill of lading, then there is nothing in the case but the common-law responsibility of the Illinois Central Railroad Company to transport the cotton to the end of their own route and deliver it there to the next carrier for transit to the place of destination. If, then, we look into the bill of lading at all, we must, in construing the words "through rate, &c.," give full effect to the clause in the body of the bill, that the company were not to be responsible for loss or injury beyond the limits of their own road; and if we do this, the utmost extent of the engagement of the Illinois Central Railroad Company beyond the limits of their own road was to undertake, in delivering the cotton to another carrier, that no

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greater rate should be charged for the entire transportation than had been agreed upon, which it appears they provided for, as the Chicago bill of lading which was given by the Union Transportation Company is for its transportation to New York according to the rate of \$2 per hundred pounds from Cairo to New York; and it appears that the bills for freight sent by the defendants to the consignees at New York for the freight from Chicago was, accordingly, at the rate of one dollar and forty-five cents.

So far, therefore, as this company are concerned, they fulfilled their contract, both as respects the safe carriage of the cotton by them, and in providing for its transportation beyond their limits to New York at the rate agreed upon.

As by their own agreement with the plaintiffs, their responsibility as common carriers was qualified in certain particulars, it is to be inferred that they had the right to contract upon the plaintiffs' behalf for its further transportation upon the same conditions. The plaintiffs having consented that this company might limit its responsibility, it would not lie with the plaintiffs to object that it agreed that the subsequent carrier to whom it delivered the cotton might transport it upon the same terms.

But, however this may be, it is very clear that they had no power to bind the plaintiffs by entering into other and different stipulations with the subsequent carriers, such as the one to which our attention is now specifically called, namely: that should losses occur under the bill of lading given by the subsequent carriers, the cost or value of the property at the date of shipment should govern in the settlement of the same. In the fulfillment of the further obligation which the Illinois Central Railroad Company owed to the plaintiffs in providing for the transportation of the cotton beyond the limits of their own road, the plaintiffs were entitled to all the security for the safety of their property or for the value of it in the event of its loss which the common law affords, in the extraordinary liability which it imposes upon carriers, except so far, or to the extent to which the plaintiffs had previously agreed to waive it.

It is claimed, however, by the defendants, that the contract

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with the Union Transportation Company for the further carriage of the cotton to New York was made with them by the plaintiffs' agent, and that the plaintiffs are consequently bound by the stipulations therein contained.

They rely upon the statement in the Cairo bill of lading that the cotton was consigned to James Warrack, agent, Chicago, and insist that he was thereby made the plaintiffs' agent or consignee at that place to provide for the further transportation of it. But the contract of the Union Transportation Company was not made with him, nor does his name appear in the bill of lading which that company gave. Their bill of lading acknowledges that the cotton was received by them, to be by them transported until it reached the point named in the bill of lading, which is stated in the margin, as follows: "Consigned to Sawyer, Wallace, & Co., New York." The bill of lading was delivered to Warrack, and was sent by him, not to the plaintiffs, nor to Halliday Brothers, who in the Cairo bill of lading are denominated the shippers, but to the Illinois Central Railroad Company.

Testimony was offered by the plaintiffs to show that Warrack was not their agent; that he had no authority to act for them in any respect, and that they did not know him; to all of which inquiries the defendants objected, and the Judge upon the trial excluded them, and also under the plaintiffs' objection, a statement of the agent of the Union Transportation Company that Warrack acted at Chicago for the shippers, and guaranteed the rate of transportation, which, we suppose, means the agent of the shippers at Chicago, who were, by that bill of lading, the Illinois Central Railroad Company. As Warrack sent the bill of lading to that company, it is fair to presume that they were his principals. It is not stated in the Cairo bill of lading whose agent he was, and if any inference is warrantable upon the whole of this testimony, it is that he was the agent of the company, and not of the plaintiffs.

Assuming then, as I think we must do, that the contract for the transportation of the cotton was made with the Union Transportation Company by the Illinois Central Railroad Company, and that that company had no authority from the plaintiff-

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iffs to enter into any stipulation as to what should be the criterion of value in the event of losses thereafter, the question arises whether that stipulation is to regulate the measure of damages in an action, not brought against the Union Transportation Company, but against the particular carrier in whose custody the property was at the time of its destruction.

It was held by Justice Nelson, in the *New Jersey &c. Co. v. Merchants' Bank* (6 How. U. S. 344), that where the action is brought against an intermediate carrier, who had the custody of the property at the time of its loss, he was entitled to the benefit of a special contract made by him with the original carrier, to the effect that the property was to be carried at the original carrier's risk, and that the intermediate carrier was not answerable for the loss unless it was shown affirmatively that it occurred from the want of ordinary care on his part; that the owner could recover against him only through the special contract which he had made, and that by bringing the action against him, the owner affirmed its provisions so far as they were consistent with the law, which would not uphold a stipulation exempting him from liability for willful misconduct, gross negligence, or the want of ordinary care.

The point that the rights of the general owner, in the event of loss, are controlled by a valid special contract between the carrier employed by him and the carrier in whose custody the property was lost, is to be regarded simply as *dictum*, not being essential to the decision of the case, as the court held that the intermediate carrier was guilty of gross negligence, for which he was answerable to the owner, independent of the contract. It was approved, however, by Justice Duer, in *Stoddard v. The Long Island R. Co.* (5 Sandf. 188), though not essential either to the decision that was made in that case, and is treated by Chief Justice Redfield, upon the authority of these two cases, in his recent work upon Carriers (§ 47), as established law.

From the high character of the court in which this *dictum* is found, the learning and great experience of the distinguished Judge by whom it was pronounced, and from the approval of it in the case cited, and in the elementary work referred to, it

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is not without diffidence that I call in question its correctness ; but I do so from a strong conviction that if, instead of being assumed to be the law, the question had been examined upon the authorities, or the reasons for it had been inquired into, it would not have been so confidently expressed.

It has been repeatedly said that the extraordinary liability imposed upon common carriers by the common law has its foundation in well-considered grounds of public policy (*Coggs v. Bernard*, 2 L. Ray, 909 ; *Barclay v. Gana*, 3 Davy, 389 ; *Thomas v. Boston &c. R. R. Co.* 10 Met. 476 ; *Hollister v. Nowlen*, 19 Wend. 241 ; *Reaves v. Waterman*, 2 Spear, 206 ; 2 Kent's Com. 602 ; *Mercantile Insurance Co. v. Chase*, 1 E. D. Smith, 131, 132), and this is constantly to be kept in view, whether the action is against the carrier in whose custody the property was lost, or the one with whom the contract was made.

A common carrier has certain obligations and duties imposed upon him from the public nature of his calling. In the language of Justice Nelson, in the case cited, " he is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself *without the assent of the parties concerned*. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal ;" and this has been the law from the Year Books down. If the owner of the goods sees fit to waive any of the conditions which the law has imposed for his protection he may do so, and when he does, he, to that extent, divests the common carrier of his public character ; or, if the agreement is, as in *French v. Buffalo &c. R. R.* (4 Keyes, 108), at " owner's risk," he makes him in that particular transaction a private carrier, with no greater obligations than an ordinary bailee for hire (*Simons v. Low*, 3 Keyes, 220 ; *Beekman v. Shouse*, 5 Rawle, 179 ; *New Jersey &c. Co. v. Merchants' Bank*, 6 How. U. S. 344).

The remedy of the owner is not limited to an action against the carrier with whom he contracted, but he may sue the particular carrier in whose custody and by whose negligence the

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property was lost or injured, in which case the action is not upon the contract, but upon the obligation and duty which that carrier assumed from the public nature of his employment, and through the omission or neglect of which the injury is presumed to have occurred, unless he shows that it arose from the act of God or the public enemies (*Bretherton v. Wood*, 3 Bro. & Bing. 54; *Green v. Clarke*, 12 N. Y. 347; *Cook v. Floating Dry Dock*, 1 Hilt. 443; *Arent v. Squire*, 1 Daly, 347; *Allen v. Sackridge*, 37 N. Y. 342; *Leslie v. Wilson*, 3 Bro. & Bing. 171; *McCall v. Forsyth*, 4 Watts & Serg. 179; *Sanderson v. Lambertsen*, 6 Binney, 129; *Pozzi v. Shipton*, 8 Adol. & El. 963; *Hide v. Trent Nav. Co.* 1 Esp. 36; *Shearman & Redfield on Negligence*, §§ 14, 111, 112; *Angell on Carriers*, §§ 422, 424, 440; *Redfield on Carriers*, §§ 40, 45; *Edwards on Bailments*, p. 466; 1 Selwyn's *Nisi Prius*, 415, 9th ed.)

In such an action, all that it is incumbent upon the plaintiffs to show is that the property was delivered into the custody of the defendant for transportation in the ordinary course of his employment as a common carrier, and the fact of its loss or injury, or of the failure to deliver it upon demand.

The contract which was made for its carriage forms necessarily no part of the plaintiff's proof, though it may be material on the part of the defendants if it qualified the first carrier's responsibility, because the subordinate or continuing carrier should not be held to any greater obligation and duty than was required by the plaintiffs of the first. Indeed the action upon the contract is of comparatively recent origin. Anciently it was upon the obligation or duty which the common law imposes, or, as the books expressed it, upon the custom of the realm. Such was the form in the old book of entries, and the action was an action upon the case (*Hearne*, 76; *Brownlow Redivivus*, 11; *Clift*. 38, 39; *Mod. Int.* 145; *Bretherton v. Wood*, 3 Bing. & Bro. 54). "Declaration against carriers in tort," says Bayley, J., in *Ansel v. Waterhouse* (2 Chitty R. 1), "are as old as the law, and continued until *Dale v. Hale* (1 Wils. 281), when the practice of declaring in assumpsit succeeded, but this practice does not supersede the other." In *Dale v. Hale*, the action was upon the

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case, but the declaration was not against the defendant as a common carrier, upon the custom of the realm, but it averred that the defendant at the special instance of the plaintiff undertook to carry the goods. No negligence was shown on the part of the plaintiff, and the defendant was allowed to give evidence that he had taken all possible care of the goods, for which the verdict was set aside, upon the ground that everything is negligence on the part of a common carrier which the law does not excuse, that is, that there may be negligence, though impossible to be detected, making the carrier liable, unless the injury arose from the act of God or public enemies (Angell on Carriers, § 169; *Evarts v. Street*, 2 Bail. S. C. 161); and one of the Judges, Denison, said that "the declaration upon the custom of the realm was the same in effect with the declaration in that case, the old form being that the defendant *suscepit*, &c., which shows," he says, "that it is *ex contractu*," an observation which gave rise to great confusion and to the impression that the action, whether it was in case or in assumpsit, was upon the contract, whereas the true rule is, that it lies independent of any contract, express or implied, upon the public obligation and duty imposed upon the carrier by law (*Merritt v. Earle*, 29 N. Y. 122); it being a general principle that where the law imposes a duty upon any one, the neglect of that duty renders him liable to any person who has been injured through the neglect of it. (See the cases collected in *Cook v. N. Y. Floating Dock*, 1 Hilt. 443, and *Green v. Clarke*, 12 N. Y. 343; *Taitan v. Great Western Railway*, 2 El. & El. 844; *Hide v. Trent Nav. Co.* 1 Esp. 36; Shearman & Redfield on Negligence, pp. 12, 13; Redfield on Carriers, § 422; Edwards on Bailments, pp. 466, 467).

It follows, consequently, in respect to common carriers, that the action may be for a breach of the contract or for a breach of the duty, and that in the one case it is an action upon the contract, and in the other an action of tort (Jeremy on Carriers, 116, 117; Angell on Carriers, § 422; Redfield on Carriers, §§ 40, 45, 412). If the action is in tort, negligence is presumed, unless the injury arose from causes which excuse the carrier, and which it is for him to show; "for the law," says Chief Justice Holt, in *Coggs v. Bernard* (2 Ld. Ray, 909),

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“charges the person (the common carrier) thus entrusted to carry goods, against all events but the act of God and the king’s enemies,” and this applies, whether the action is upon the contract or for the neglect of the duty. It was declared by the Court of the King’s Bench, in *Garside v. Trent Nav. Co.* (4 T. R. 581), that where goods were received by a carrier to be transported to a place beyond the limits of his own route, that his extraordinary responsibility as carrier ceased at the termination of it, and that his obligation then was simply to forward them by the nearest connecting conveyance. This was a distinction well defined and easily understood; but within the last thirty years a group of cases have been decided in England that have brought this whole subject again into confusion and revived the impression that there is no right of action in the event of loss or injury, except upon the contract. These cases (*Muschamp v. Lancaster &c. Railway*, 8 Mee. & Wells. 421; *Scothorn v. South Staffordshire Railway*, 8 Exch. 341; *Collins v. Bristol &c. Railway*, 11 Exch. 790; 1 Hurl. & Nor. 517 id.; 7 Ho. Lds. Cas. 194; *Wilby v. West Cornwall Railway*, 2 Hurl. & Nor. 703; *Mytton v. Midland Railway*, 4 id. 615; *Coxen v. Great Western Railway*, 5 id. 247), taken collectively, decide that where a railway company books a package for delivery at a point beyond the limits of their own road, and receives the whole sum which is paid for the entire transportation, or agrees that it may be paid when the parcel is delivered at the place of destination, or their agent, when he receives it, signs a paper to the effect that it is delivered into his charge, for a person in a place beyond the limits of their road, that they are liable in their capacity as common carriers for its safe carriage, throughout the entire route, though it may be lost upon a railroad beyond the limits of their own road to whom it has been delivered, and with whom they may have no connection or business arrangement, even though the agent of the owner may sign a way bill declaring that the company receives the charges payable to the other companies for the owner’s convenience, and that they are not to be liable for loss or damage occurring upon other railways; or if, when it was lost upon another road, it was in a truck belonging to the company in charge of their guard, which was attached

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to the train upon the other road, though the receipt which the company gave for it specified that they would forward it beyond their own line by other carriers, whose charges, for the owner's convenience, would be added to their own, and that when they did so that the delivery on their part was to be complete and their responsibility at an end. That the contract in that case was to be regarded as an entire one to carry the package to and deliver it at the place of destination, and that wherever this was the case no action could be maintained by the owner against the subordinate carrier upon whose road it was lost or injured, but that his remedy was against the company with whom the contract was made. It is proper, however, to say, in respect to the last proposition, that in the case in which it was held (*Mytton v. Midland Railway*, 4 Hurl. & Nor. 615; *Cowen v. Great Western Railway*, 5 id. 247, and *Bristol &c. Railway v. Collins*, 7 Ho. of L. Cases, 194), the action was not brought upon any public obligation and duty, but upon what must be regarded as an averment of a contract between the owner and the intermediate carrier, upon whose road the property was lost, and it may be that the extent of the ruling was that where the contract with the first carrier is for the entire route, no action upon contract can be maintained by the owner against the subordinate carrier, as it was declared by Lord Mansfield, in *Forward v. Pittard* (1 T. R. 27), that for a hundred years before his time upon the cases a common carrier was liable *independent* of his contract; that by it he was bound to care and diligence, and liable upon it for negligence; but that there was a *further degree of responsibility* by the custom of the realm or the common law by which he was held to a responsibility in the nature of that of an insurer, and it is not to be inferred that the court meant by their decision in these cases to gainsay what was declared so positively to be the law by a judge of the eminence of Lord Mansfield.

The American courts, as a general rule, have not gone to the length of these cases in construing a common carrier's liability. While they have rigorously held him to his common-law responsibility when the property was lost or injured in his custody, and, indeed, more rigidly than in the English courts, they have, at the same time, acted upon the more just and rational rule

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that his liability is *prima facie* limited to the safe transportation of the property over his own route; that his obligation, then, is to forward it by the usual or most direct conveyance to the place of destination, and to store it, or otherwise to take charge of it until that can be done; that this is the extent of his obligation, though he may give a receipt or sign a bill of lading which names another and more remote point of delivery. He may contract specially for its carriage to and delivery at its final place of destination, and where he tickets it through or takes payment for the whole distance, without any qualification or reservation, it may be inferred that he has made such a contract; but otherwise, his extraordinary responsibility, and the reasons for it, continue only while it is in his own custody, and ends when it is delivered to the next carrier (*Converse v. Norwich &c. Trans. Co.* 33 Conn. 166; *Nutting v. Connecticut &c. Railroad Co.* 1 Gray, 502; *Detroit &c. Railway v. Farmers' Bank*, 20 Wis. 122; *Weed v. Saratoga &c. Railroad Co.* 19 Wend. 534; *Farmers' &c. Bank v. Chumplain Trans. Co.* 23 Vt. 186; *Van Santvoord v. St. John*, 6 Hill, 157; *Hood v. N. Y. &c. Railroad Co.* 22 Conn. 1; *Penn. Cent. Railway v. Schwarzenberger*, 45 Penn. St. 208; *Hunt v. N. Y. & Erie Railway*, 1 Hilton, 229; *Krender v. Woolcott*, id. 227; *Dillon v. N. Y. & Erie Railroad*, id. 231; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Mallory v. Burrett*, id. 234).

Regarding it, then, as the law of this country, that an intermediate carrier, in whose custody the property was lost or injured, is answerable to the owner, the question recurs whether he can be allowed to absolve himself, when he receives goods for carriage, of the responsibility incident to the public nature of his calling, by an agreement, not with the owner of the goods, who is the one to be affected in the event of loss, but by an agreement entered into with the carrier from whom he receives the property upon its transit to the place of destination.

It is said, in the marginal note to *Ladue v. Griffith* (25 N. Y. 364), and I quote it because it conveys succinctly the view expressed in the opinion, in which the majority of the Judges of the Court of Appeals concurred, that "public policy,

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in this country of long routes and frequent transshipment, forbids any interment which would favor an intermediate carrier in divesting himself of that character, and assuming the more limited responsibility for a forwarder;" or, it might be added, in assuming, at his own election, or with the concurrence of the carriers who deliver him the goods for further transportation, the obligation only of an ordinary bailee for hire. "The carrier at common law," says Justice Smith, in the opinion last referred to, "is an insurer of the goods as against all accidents and perils except such as result from acts of God or a public enemy. Millions of property in value in this country is in the constant possession of carriers engaged in transporting it from one place to another. In this particular it may be truly said that men cast their bread upon the waters expecting to see it again, at a distant point, after many days. Goods are shipped and delivered to carriers by land, at the seaboard, or in the interior of the country, for transportation to distant points, with a simple direction indorsed of the name of the owner or consignee and the place of delivery;" and in a subsequent case (*McDonald v. Western Railroad Co.* 34 N. Y. 500), the same Judge remarks "that the vast business of inland transportation of goods in this country is carried on, mainly, by routes formed by successive connecting lines of transit belonging to different owners, each of whom carry the goods over his own line, and deliver them to the next, who, in his turn, takes them on until they reach the final place of destination; that to carriers thus situated, and to goods thus transported, the policy of the common law rule of liability applies with peculiar force. It is a public policy, springing from the public nature of the employment of the carrier, and rendering their good conduct a matter of importance to the whole community."

Should all these intermediate carriers, instead of discharging the duty which is required of them in their public capacity, under the responsibility which the law imposes to secure the faithful performance of it, be permitted to qualify, alter, or change their responsibility as they think proper by agreements among themselves, or by inserting stipulations in the bills of

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lading which pass from one to the other in acknowledgment of the receipt of the goods for the purpose of carriage? If they can do it in one particular they can do it in all, and reduce their liability in every case to that of ordinary bailees for hire. If they can do this without the privity, consent, or knowledge of the owner, of what practical value, in a long course of transportation, and over many different routes, is the public rule which imposes upon common carriers the responsibility of insurers? It could be frittered away by printed stipulations on bills of lading delivered to the carrier from whom the goods are received at the end of his route, and who, expressing no dissent, accepts the bill of lading, both as his voucher of the delivery of the property into the hands of the continuing carriers, and as the evidence of the contract made with the carrier for the further transportation of it. Should this be allowed without the concurrence or assent of the owner? Is he to be deprived of the protection which the law affords him for the security and preservation of his property and its due delivery at the place of destination, by the agreements which the carriers along the route enter into among each other, or by the printed conditions of bills of lading which they may see fit to interchange one with the other? How unjust this would be to the owner who surrenders up his property to a carrier for safe carriage and delivery at a point beyond that carrier's route, and which may involve the necessity of its custody by many continuing carriers, may be very well illustrated by the present case, for here the first carrier, The Illinois Central Railroad Company, stipulated, in the bill of lading which they delivered to the plaintiffs or to their agents, that they assumed no responsibility beyond their own route, and that the legal remedy for any loss or damage should be against the particular carrier or forwarder in whose custody the property actually was at the time of the happening thereof. For any loss or damage, therefore, that might happen to the property after they had parted with the custody of it, no recourse could be had against them, and this being the case, are they to be allowed to bind the plaintiffs by making special contracts with the carriers to whom

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they deliver it for further transit, which take away or lessen those obligations which the law has imposed for his protection and that of all who entrust their property to common carriers? If this were so, every carrier through whose hands the property passes might impose his own terms and conditions; and when the owner sought his remedy against the carrier who had the custody of the property when it was lost or injured, and who in this case would be the only one who would be answerable to him, he might be met by a special contract, which he knew nothing about, absolving that carrier from all liability unless the owner could prove how the loss happened, and that it occurred through the carrier's negligence. In the printed part of many of the bills of lading of carriers which I have seen in the trial of causes, there has been a clause that the carriers were not to be responsible unless it could be shown *affirmatively* that the loss or damage occurred through the negligence of the carrier or his agents, thus imposing upon the owner, who may be living thousands of miles away, the obligation, before he could venture upon his action, of ascertaining exactly how the loss or injury happened, which in most cases would be difficult, and in many impossible. One of the very reasons for the extent of the liability of common carriers, as was said by Lord Mansfield, in *Forward v. Pittman* (1 T. R. 33), is "to prevent," the necessity of going into circumstances impossible to be unravelled; "and therefore," he says, "the law presumes against the carrier, unless he shows that the injury was done by public enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests."

It has been repeatedly held that a common carrier cannot, by a special acceptance, or by simply delivering a receipt or bill of lading containing stipulations to that effect, qualify his common-law ability (*Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 138; *Buckland v. Adams Express Co.* 97 Mass. 132; *Fish v. Chapman*, 2 Kelly, Ga. 357; *Judson v. Western R. Co.* 6 Allen, 486; *Southern Express Co. v. Newby*, 36 Ga. 635).

The owner may agree to exempt the carrier from all or any part of his responsibility. It may be the owner's interest to do so. He may be willing, in consideration of paying less than

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the ordinary rate, to take upon himself exclusively the risk of loss or damage in the carriage of the goods, and discharge the carrier from all liability therefor; but it must be shown that he expressly agreed to do so. His assent is not to be implied because a receipt or bill of lading has been delivered to him, with printed stipulations qualifying the carrier's liability. He is under no obligation to read them over and point out what he dissents from, or declare that he dissents from the whole of them, at the peril otherwise of being concluded or bound by them. He may remain entirely passive, as he has the right to hold the carrier to the full extent of his common-law responsibilities, whilst the carrier has no right, upon his part, to impose any other or different conditions.

Indeed, it is difficult to see how the owner's assent can be assumed unless he signs some memorandum or agreement in writing, or expresses it by some affirmative declaration *or act*, or it is shown that, in consideration of his taking the risk, the goods were to be carried at a lower rate than it was customary to charge, which, possibly, may be inferred where, as in *French v. Buffalo &c. R. Co.* (4 Keyes' R. 108), the significant words "owner's risk" are written across the face of the receipt or bill of lading.

If the carrier, then, cannot bind the owner by stipulations in the receipt or bill of lading which he gives when he receives the goods from him for carriage, it is very clear that an intermediate carrier cannot bind the owner by delivering a receipt embodying such stipulations to the carrier from whom he receives the goods in their transit for carriage over his route. He may refuse to receive them, it has been said, unless he is paid in advance for their carriage (*Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 124); but if he takes them, he can take them *only* under and subject to his common-law responsibility, which falls upon him the moment they are delivered into his custody (Angell on Carriers, §§ 129, 356; *Grosvenor v. N. Y. Central R. R.* 39 N. Y. 34; *Michaels v. N. Y. Central R. R.* 30 N. Y. R. 564; Story on Bailments, § 533).

That responsibility he cannot vary or alter by a special acceptance, or by the delivery of a bill of lading—a receipt con-

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taining terms and conditions—nor can he, in my judgment, by a special agreement with the carriers from whom he receives the goods, unless it is shown that the carrier had authority from the owner to make such an agreement. “A man bound to any duty by operation of law,” said Lord Kenyon, in *Hide v. The Trent Nav. Co* (1 Esp. 36), “cannot, by any act of *his own*, discharge himself; and he gives as an illustration the case of the carrier; to which, it may be added, nor can one carrier by an agreement with another discharge himself from the responsibility which the law imposes, and deprive the owner of the goods carried of what is in effect a public regulation, which the owner alone has the right to dispense with.

No other view than this will afford that protection to the owner which it was the object of the common law to secure, or prevent the rule it has laid down from being impaired by the ingenuity and contrivances of carriers; and in respect to the necessity of maintaining the rule in its integrity, it may be well to keep in mind the observation of Chancellor Kent upon its establishment in England, that it had its foundation “in a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation in succeeding generations” (2 Kent’s Com. 602).

I shall hold, therefore, in this case, (1) that the intermediate carrier cannot avoid the public responsibility, which he is under to the owner, to carry the goods in safety, and subject to all the obligations and conditions which the law imposes, by a special agreement entered into with the carrier from whom he receives them, unless it is shown that the carrier had authority from the owner to make such an agreement. (2) That the intermediate carrier is entitled to the benefit of any agreement entered into by the owner with the first carrier qualifying or limiting the common-law responsibility, and will be regarded as taking the goods for carriage, upon the same conditions and subject to the limitations or exemptions that exist in that agreement; and (whether I am right or not in the first of these propositions) that no special contract for additional limitations was made on the part of the Union Transportation Company, by simply delivering a receipt with such conditions printed upon

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it, to the agent of the Illinois Central Railroad Company, when the goods were received for carriage, which is all that there is in this case to support the assumption of a special agreement that the value of the property at the place of shipment was to govern in the event of loss, instead of at the place of delivery, the latter being the equitable and just rule which the law imposes.

The Union Transportation Company contracted for the carriage of the cotton from Chicago to New York, and whether the defendants, the Camden & Amboy Railroad and Transportation Company, in whose custody it was destroyed by fire, are to be regarded as the agents of the Union Transportation Company, or as a subordinate or connecting carrier, can make no difference as respects their liability to the plaintiffs.

As subordinate or connecting carriers they were entitled to the full benefit of the accepted risks contained in the Cairo bill of lading, and have received it upon the trial and in the decision previously made in this case. By the bill of lading a loss by fire was one of the perils from which the carriers were to be exempted. No recovery could therefore be had against the defendants, unless the plaintiffs could establish that the loss was occasioned by their negligence, which the plaintiffs succeeded in doing, by showing that the cotton was destroyed by a fire upon the defendant's premises, the defendants failing, or being unable to show how the fire originated, and the jury finding, in the absence of satisfactory explanation, that it was from the want of proper care and diligence. Of their liability as intermediate carriers to the plaintiffs for a loss occasioned by their negligence, there is not the slightest doubt upon the authorities already referred to, both in this and in the former opinion. The complaint, it is true, sets up a contract between the plaintiffs and the defendants, but it also avers that they so negligently conducted and misbehaved in their calling as carriers, that the cotton was never delivered to the plaintiffs, but was wholly lost to them.

This is an averment of negligence, and if the complaint is defective in setting up also a contract between them and the plaintiffs, the court can and will, after verdict, and in further-

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ance of justice, so amend the complaint as to confirm the pleading to the proof.

They are not entitled to the benefit of the clause inserted in the Chicago bill of lading, with the design of substituting a different rule from that which the common law declares shall regulate the measure of damages, for the reason already given that no contract of that nature was made by the Union Transportation Company, delivering to the agent of the Illinois Railroad Company a receipt or bill of lading embodying a printed stipulation to that effect, nor in my judgment could have been made so as to bind the plaintiffs, unless they had conferred the authority.

The judgment must therefore be affirmed for the whole amount of the verdict.

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CLARK, JOHN D. MAXWELL, AND DAVID CRAWFORD, JR.

It is a general rule that the voluntary payment of a claim, with a full knowledge of all the facts, where there is neither duress, compulsion nor fraud, is final, and the money cannot be recovered back on the ground that the party was under no legal obligation to pay it.

But this rule applies only where payment is made with a knowledge of, or with the means of ascertaining, all the facts, and under circumstances which must be regarded as equivalent to an acquiescence in the claim, and where the party receiving payment is entitled to treat it as received in the final settlement and discharge of the claim.

Hence, where the buyer of a certain amount of gold coin claimed that only a portion of it had been delivered to him, and notified the seller that unless the residue was delivered, he would buy the coin elsewhere on the seller's account, and the latter, in order to prevent such a purchase on his account, delivered the residue claimed to be due, under protest and expressly declaring that the delivery was made without a waiver of his rights: *Held*, that such subsequent delivery was not, by the intention of the parties, or necessarily by its operation or effect, a delivery under the contract of sale, and was not therefore conclusive upon the seller so as to prevent a recovery, in a proper action, of the amount so delivered.

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A contract of sale, where payment and delivery are to be contemporaneous acts, is not complete until payment is made; but the seller may waive the condition of simultaneous payment by an unconditional delivery of the actual possession of the goods, and in such case, in the absence of fraud, the delivery is good and title passes.

The plaintiffs' clerk delivered five bags of gold, weighed and marked, upon the defendants' counter. The defendants' clerk drew the bags to the inner side of the counter, and commenced to mark the tags attached to them with the plaintiffs' name, it not being the defendants' custom to weigh or count their contents: *Held*, a good delivering of the gold.

In a case where the testimony on either side cannot be said to be evenly balanced, it is not error to refuse to charge that if the testimony on the plaintiffs' part is balanced by that on the defendants' part, the latter is entitled to a verdict. It should be left to the jury to determine where the preponderance of testimony lies.

APPEAL by the defendants from a judgment entered on the verdict of a jury at trial term. The facts are fully stated in the opinion of the court.

John E. Burrill, for respondents.

T. C. T. Buckley, for appellants.

DALY, F. J.—The questions of law argued upon the motion for a new trial are so involved with the pleadings and the evidence, that an examination of both will be necessary to a clear understanding of the points to be passed upon.

The plaintiffs aver that before the 26th of September, 1864, they sold to the defendants \$25,000 of gold coin, at the rate of 212½ per cent., and upon the same day delivered it to the defendants; that the defendants have paid them only for \$20,000 gold, and they bring their action to recover for the remaining \$5,000, which, at the rate agreed upon, is \$10,625 in currency.

The defendants answer that the plaintiffs delivered \$20,000 gold on the 26th of September, and the remaining \$5,000 on the 29th of September thereafter, and that the defendants have paid them for the \$25,000 at the rate agreed upon.

The issue, therefore, upon the pleadings is, whether the defendants have, as they aver, paid the remaining \$5,000 or not.

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It was shown on the part of the plaintiffs that on the 26th of September they sent five bags of gold, each weighing \$5,000, to the defendants. The five bags were sent to the defendants' office in Wall street—the plaintiffs' chief clerk, Kirholtz, carrying two, and the plaintiff's porter, Corneilson, carrying three. The clerk and porter entered the defendants' office together; the porter placed the three bags carried by him upon the defendants' counter, and the clerk did the same with the two bags he was carrying. The porter then placed his three bags together and took the two bags from Kirholtz and placed them upon the top of the three in the form of a pyramid. After that Kirholtz called the defendants' gold clerk, Wheeler, and said to him: "Here is \$25,000 of gold from Meyer & Greve" (the plaintiffs), and the gold clerk answered, "All right." The plaintiffs' clerk, Kirholtz, handed the statement of the amount to the plaintiffs' porter, Corneilson, and Corneilson afterward handed it to the gold clerk. When Kirholtz had attracted Wheeler's attention to the \$25,000 of gold, and the latter answering "All right," Kirholtz left the office. As he left, the five bags were at the outer side of the counter, about five inches from the edge, the plaintiffs' porter, Corneilson, guarding the gold, having both his arms extended around the bags, and leaning over so that the bags were close to his body. As Kirholtz left, he told Wheeler to give the check for the gold to Corneilson, Wheeler having at the time in his hand the statement which Kirholtz had given to Corneilson, and after Wheeler had said "all right." As Kirholtz was leaving, he saw Wheeler extend his hands and commence to draw a bag of gold over to his (Wheeler's) side of the counter. Corneilson, the porter, testified that Wheeler drew the five bags, one after the other, over to his side of the counter and commenced marking them, there being then six or seven persons at the counter; that Wheeler marked the first and second bags, and put them successively behind him upon a shelf, and as he put each upon the shelf he turned around, turning his back to the counter; that he, Corneilson, afterward turned around and saw Wheeler putting up another bag, there being then but one bag upon the counter, and as Wheeler turned toward the counter he said to the wit-

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ness: "Where is the other bag? there is one bag missing;" to which Corneilson replied "that he did not know; that he had delivered to him five bags." But Wheeler claimed that he had delivered but four. That there were then four or five, or there might have been six, persons at the counter; that Mr. Maxwell, one of the defendants' firm, then offered Corneilson a check for \$20,000 of gold, but witness said he had delivered \$25,000, and that he wanted a check for that amount; to which Mr. Maxwell answered, "that he might either take the gold or a check for \$20,000 of gold," which Corneilson refused to do, and brought back the four bags to the plaintiffs, which were, on the following day, returned to the defendants, and the check for \$20,000 received. Mr. Gentil, one of the largest dealers in gold, was standing at the counter talking to Mr. Maxwell while Kirholtz and Corneilson were in the office, and the witness saw what appeared to him to be five bags of gold together on the counter, lying in front of Kirholtz and another person. They seemed to the witness to be in a pile. He could not say whether there was one on top, but he thought that there were two bags on the top of the others. On the 29th of September the defendants, by letter, required the delivery under the contract of the remaining \$5,000 of gold, at 212½ per cent., declaring that otherwise they would buy it on the plaintiffs' account. The plaintiffs, in answer, sent \$5,000 in gold, with a letter declaring that they considered that they had delivered the \$5,000 gold under the contract, and that they sent \$5,000 gold, at 212½ per cent., under protest, and without prejudice to their rights.

Upon this testimony the plaintiffs rested. The defendants moved for a nonsuit, the grounds of which need not now be considered, as the motion was renewed at the close of the case.

On the part of the defendants, Wheeler, the gold clerk, testified that Kirholtz handed him a slip of paper saying, "Here is our gold,"—or Meyer & Greve's gold—"give the check to this man," pointing to Corneilson; that he, Wheeler, took the paper from Kirholtz, together with the two bags of gold, drawing the two bags by their mouths over to his (Wheeler's) side

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of the counter, where he marked them and placed them on the gold shelf, which was six or eight feet from the inner side of the counter. That he then came back to the counter and took one bag from Corneilson, marked it, and put it upon the shelf, and that when he came back to the counter for the fourth bag, Corneilson was not there, and he saw that there was but one bag remaining. That he then called out "Meyer & Greve" twice, but no one answered. That he then said, "Who brought this gold?" but no one replied. That he then said to each one in front of the opening at the counter, there being two or three persons there, "Did you bring it?" but all denied any knowledge of it; upon which he marked the fourth bag and put it on the gold shelf. That he then took the statement and went to the desk, and after a short interval came back to the counter to see who would come in to claim the ownership of the gold, or to get a check for it, when he saw Corneilson coming down the William street steps of the defendants' office (the office being in a basement), who came up to the counter and asked for Meyer & Greve's check. That the witness asked him how many bags he had brought, and he said five, or \$25,000. That the witness told him he had received but four, to which Corneilson made no audible reply. That he then asked him why he had gone out of the office, and repeated the question, to which Corneilson said nothing, but in a moment afterward asked for Meyer & Greve's check. That the witness told him that he had received but \$20,000, four bags, and that he would give him a check for \$20,000, to which Corneilson made no reply. That Mr. Maxwell, one of the defendants, then came up and asked Corneilson what was the matter, upon which the witness gave Mr. Maxwell his (the witness') version of it, while Corneilson merely said that he wanted the plaintiffs' check; and to the inquiries put to him said very little in reply. The witness had no recollection of seeing Mr. Gentil there, who was well known to him, and whose testimony as to the bags of gold being together in one pile was in conflict with that of the witness. The witness was then asked if he saw more than four bags, and answered that he was under the impression that the two young men brought in five bags, one

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bringing two and the other three; that he was quite confident of that; and when Corneilson was pointed out to him in court he was unable to say whether he was the person who came with the gold, nor would he swear that he was the person whom he saw coming down the steps, and to whom he had previously referred as Corneilson, but thought that from his hair, his mode of dressing, and in other ways, that he was the same person.

Clark, one of the defendants' employees, testified that Wheeler took two bags from Kirholtz; that he saw the young man who was left in charge of the gold go out of the office and return in about three minutes afterward; that while he was gone Wheeler called out for Meyer & Greve, but the witness could not identify Corneilson when pointed out to him in court as the person he referred to.

Davis, the defendants' cashier, testified that he saw Wheeler come up to the counter, take two bags, draw them toward him, mark them, and put them on the shelf; that after Wheeler took the two bags, the witness saw one of the two men who brought the gold go out, and the next thing he heard was Wheeler's statement that the delivery was short, and that there was a bag missing; and that he heard Wheeler call out twice for Meyer & Greve, and heard him ask two or three persons at the counter if they had brought the gold; that when this occurred there was no one there who made any response to the call for Meyer & Greve, or representing the gold; that the next he saw was a person coming down the steps, who came up to the counter and demanded a check for Meyer & Greve's gold. That Wheeler asked why he had left the office; why he did not stay with the gold; that the witness heard no answer; but afterward, in the conversation which the young man had with Maxwell, he heard him use words tantamount to saying that he had delivered the five bags.

Dolson, one of the defendants' clerks, corroborated substantially the statements of the last witness—that he saw Wheeler come over and take two bags from the outside of the counter, draw them over, mark them, and put them on the shelf; that he afterward heard him call for Meyer & Greve and ask who brought the gold, without receiving any answer; that the wit-

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ness next saw a young man come in at the William street door, who came up to the witness and asked him for a check for gold, and the witness referred him to Wheeler, who told him that he had received but four bags—that there was one short, to which the young man said nothing. That Wheeler asked him if he had gone out of the office and he said "No." Wheeler said, "Why did you leave the office?" and the young man made no answer.

Maxwell, one of the defendants, testified that when he came up and heard of the missing bag, Wheeler and Clark told him that the young man had gone out and left the bags; that he asked him why he had gone out, leaving the gold unprotected, and that he made some ejaculation, which the witness supposed was intended for a denial—upon which the witness said, "Here is Mr. Wheeler and Mr. Clark who saw you go out," and that the only reply of Corneilson was that he wanted a check for \$25,000 of gold, and would not take one for \$20,000. The witness also testified that at the time there were two or three bags of gold upon the floor where the parties stood near to the counter, and down at their feet, which was the place for the temporary deposit of gold, when they were in a hurry, and Greve, one of the plaintiffs, testified that Wheeler told him that he saw five bags upon the counter, but that he had received only four.

This being, in substance, the testimony, the defendants, as before stated, renewed their motion for a nonsuit upon several grounds. They claimed, that as it appeared both by the pleadings and by the evidence, that the plaintiffs had voluntarily delivered the additional \$5,000 with a full knowledge of all the facts, they could not recover in this action, relying in support of this objection upon the cases of the *Supervisors of Onondaga v. Briggs*, 2 Denio, 26; *Fleetwood v. The City of New York*, 2 Sandf. 475; and *Forrest v. The Mayor &c. of New York*, 13 Abb. R. 350.

In the first of these cases, it was held, that moneys paid to a district-attorney by a board of supervisors, over and above his lawful compensation, upon the auditing and settling by them of his accounts, and with a full knowledge of all the facts, could

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not be recovered back, and in the two latter cases it was decided that where the owner of land in the city of New York, voluntarily paid to the corporation an assessment upon it, though accompanied by a protest to the Street Commissioner, against the legality of the assessment, he could not recover it back again, even though the assessment may have been illegal and void.

It is undoubtedly a general rule that the voluntary payment of a claim, with a full knowledge of all the facts, where there is neither duress, compulsion, nor fraud, is final, and that the money cannot be recovered back upon the ground that the party was under no legal obligation to pay it.

This rule was first deliberately settled by the decision of the majority of the court, in *Brisbane v. Dacres* (5 Taunt. 144), and the reasons there given for it, and which must be considered in determining whether it does or does not apply in the present case, are set forth with great clearness by Sir Vicary Gibbs, after a full investigation of the subject and a review of the previous adjudications. "Where a man," he says, "demands money of another, as a matter of right, and the other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid," and the reasons he gives are substantially these: By submitting to the demand, he that pays the money *gives* it to the person to whom he pays it. He makes it his, and closes the transaction between them. He that receives it *has a right to consider it his without dispute*. He spends it in the confidence that it is his, and it would be most mischievous and unjust if he who has acquiesced in the right, by such voluntary payment, should be at liberty to rip up the matter and recover back the money. He who received it is not in the same condition. He may spend it in the confidence that it is his, and may not have the means of repayment. The party who paid it may afterwards, and upon a further view, have a different opinion of the law, and it may be that that opinion is the correct one; but there are many doubtful questions in the law, and when a question arises, the party has his option to litigate it, or to submit to the demand and pay the money; and if

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he does the latter, he closes and puts an end to the transaction, for were it to be held otherwise, many inconveniences would arise. Justice Heath, in the same case, gives the reason more tersely: "For the plaintiff is a judge in his own case, and decides against himself, and he cannot be heard to repeal his own judgment;" and the Chief Justice, Sir James Mansfield, illustrated the rule in its application to Admiral Dacres, to whom the money in that instance was paid: "It would be most contrary to *equum et bonum* if he was compelled to pay it back—for see how it is, if the sum be large, it probably alters the habits of his life; he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress; is he then, five years and eleven months afterward, to be called upon to repay it?" It is apparent, from the reasons here given, that this rule was intended to apply where payment is made under circumstances which must be regarded as equivalent to an acquiescence in the claim, and where the other party is entitled to treat, it as received in the final settlement and discharge of it. In *Fleetwood v. The City of New York* (*supra*), Chief Justice Sandford says, that "where there is no legal compulsion, a party yielding to the assertion of an adverse claim, cannot detract from the force of the concession by saying that he objects or protests at the same time that he actually pays it; for the payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim." This may be true in certain cases, and it may have been strictly applicable to the case which was then before the court. Several lots of ground, belonging to the plaintiff, in the city of New York, had been sold for the nonpayment of an assessment for filling them up. The lots were redeemable under the assessment sale within a given period, upon the repayment of the amount of the purchase-money with interest, at the rate of twenty per cent. per annum, and were within that period redeemed by the plaintiff, who paid the amount and the interest to the Street Commissioner, accompanying the payment by a protest to that officer against the validity of the assessment. The plaintiff afterward brought an action against the city to recover back the amount he had paid, upon the

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ground that the assessment was illegal and void, and it was held that he could not recover it. The corporate authorities and the purchaser at the assessment sale, as it appeared, had maintained that the assessment was valid, whilst the plaintiff insisted that no corporation ordinance had ever been legally passed to authorize the filling up of the lots. If the plaintiff was right, the whole proceeding was void, and the purchase and conveyance of the property under it was, as the court held, no cloud upon the plaintiff's title. He might, if such were the fact, have treated the whole proceeding as nugatory; but he was negotiating for a loan by mortgage upon the lots, and finding this assessment an obstacle to his obtaining it, he saw fit, instead of abiding the result of a litigation which was then pending to test the validity of the assessment, to redeem the property by the payment of the purchase-money with the interest, at the rate of twenty per cent. By doing this he necessarily recognized and acquiesced in the validity of the assessment and of the sale and conveyance under it, for his protest could be productive of no effect, being made to the Street Commissioner, an officer who was simply the head of one of the many departments which exist under the complex municipal government of this city, who had no discretion whatever in the matter, nor any power or control over the money. That officer, by statute, was bound to receive the money when the plaintiff tendered it, and when received, it belonged, not to the corporation, but to the purchaser, and was immediately payable over to him. The plaintiff, as before suggested, was at issue with the purchaser and with the corporate authorities as to the fact which the plaintiff relied upon to show that the assessment was illegal. The purchaser, after the payment of the assessment and of the interest upon it, was entitled, at the expiration of the period limited, to a lease of the property for the term of years for which he had agreed to take it, at the assessment sale, if the owner should not in the meanwhile redeem it (Valentine's Laws relating to the City of New York, 1,238). But the plaintiff, by redeeming under the assessment sale, cut the purchaser off from the exercise of this right, and put it out of his power to obtain his lease, which, if the assessment were valid,

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as the purchaser claimed it to be, would have vested in him the property for a term of years. By this act the plaintiff did what he could not afterward undo. The purchase-money and the twenty per cent. interest upon it, when paid, is, by the express term of the statute, paid to the use of the purchaser. The plaintiff, therefore, by paying it, paid it in effect to the purchaser, and his claim to recover it, under these circumstances, afterward from the city, was wholly without foundation. By his own act he had put an end to the matter in controversy—an act which he did not and could not qualify by his protest, there being no one upon whom the protest could operate or take effect.

But it may be very different between two principals in a transaction, where one of them, as in the present case, claiming that a certain amount of gold only has been delivered, demands the delivery of the residue, or that they will buy it on the other party's account, and the other party, to prevent an act which might further complicate the transaction, sends the amount in dispute, with a distinct statement, however, that they consider that they have already delivered all that they engaged to do, and send it, therefore, under a protest, and with the express declaration that they do it without prejudice to their rights. This cannot be regarded as a delivery of gold under the contract. It was not so intended by the plaintiffs, and could not, under the notice given to them, be so regarded by the defendants. It was sent for a special reason, because the defendants had notified the plaintiffs that they would buy \$5,000 gold on their account, and it might be, if that were done, that the gold when bought would be at a higher rate of premium, which would increase the plaintiffs' liability if it should be ascertained that their agents had not delivered the missing bag. The rule under consideration, moreover, applies only when the act, which is regarded as conclusive, whether it be a payment or a delivery, is done with the full knowledge of, or with the means of ascertaining, all the facts (*Martin v. Morgan*, 1 Brod. & Bing. 289; *Spragg v. Hammond*, 2 Id. 59; *Braunton v. Roberts*, 4 Bing. 11), which cannot be said to exist here, so as to give to this act necessarily the force and effect of a delivery under the contract.

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The distinction, as has been said (*Martin v. Morgan, supra*), is between a mistake of the law and an ignorance of, or a misconception of, the facts of the case. It is a rule as old as "Doctor and Student" (ch. 46), that a man is bound at his peril to have knowledge of what the law is, the maxim being *ignorantia jura non excusat*; but it is otherwise in respect to the facts, and a man may be excused where he acts in ignorance of them and without the means of knowledge. In *Chatfield v. Paxton* (see note a. to *Bilbie v. Lumley*, 2 East, 469), the plaintiff, upon accepting a bill, was under great uncertainty as to the facts, and afterward paid it, under a protest that if, upon his arrival in India, he afterward found his impressions confirmed, he should call upon the house there to indemnify him. He brought the action afterward against a partner of that house, and recovered the amount back. Ashurst, J., upon the motion for a new trial, said "that where a payment had been made, not with the full knowledge of the facts, but only under a blind suspicion of the case, and it was found to have been paid unjustly, the party might recover it back again;" and Lawrence, J., agreed, though of opinion that the plaintiff was apprised of the general outline of his defense when he made the payment, but was not then so conversant with the particular facts, as they appeared at the time, as to have been able to resist the demand then made on him, if an action had been brought, but seemed to have only a confused notion of them.

The plaintiffs in this case cannot be said to have had a knowledge of all the facts, within the meaning of this rule. They were not present when they transpired, and those who were present were in direct conflict as to what had actually occurred. The missing bag was probably stolen by some one from the counter, either through the negligence of the plaintiffs' porter in quitting the custody of it before the defendants' gold clerk had taken possession of it; or through the want of proper care and vigilance on the part of the latter, after it had been delivered into his custody. There was presented here a question of great doubt and difficulty, upon which a former jury were unable to agree, and which the jury on the present trial decided upon a direct conflict between the witnesses. If the

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account given by the defendants' witnesses were correct, the bag had never been delivered into the possession of the defendants' gold clerk, and was lost through the negligence, or by the instrumentality, of the plaintiffs' porter; while if the version which he and the plaintiffs' clerk gave were true, the bag had been delivered into the custody of the gold clerk, and its loss was attributable to his negligence. It does not appear in the case that the plaintiffs knew the facts as given by the defendants' witnesses, but even if they did, they could not then know what was the true state of facts, for the question was one that could be ascertained and settled only by a judicial investigation; and this being the case, there was a propriety in their taking such a course as would lead to that disposition of it. There was, as I have before suggested, a reason for their delivering the additional \$5,000 in coin, and the protest which accompanied the act was a clear intimation that it was not to be taken as any acquiescence in the defendants' claim. What they did was equivalent to saying, "We consider that we have fully performed the contract on our part, and will bring an action to compel the full performance of it on your part; but to dispense with the necessity of your buying gold on our account, which would but complicate the transaction, and might increase our liability if it should be ascertained upon a judicial investigation that our agents did not deliver the missing bag, we will send you an amount of gold equal to the amount in dispute, but with the distinct understanding that it is not a delivery under the contract, and that the payment for it is not to be regarded as a payment upon the contract." They might actually infer that they had the right to do this, and that their protest would prevent their being concluded as to the matter in dispute, from the meaning which is ordinarily attached to a protest, in the popular acceptance of that term, as will be found by consulting the common and usual work of reference. Thus, in the *New American Cyclopaedia*, a work of a popular character, and in very general use, there is given under that head this definition: "One who is called upon to pay an import duty, a tax, a subscription, or the like, which he thinks he ought not to be required to pay, but is unwilling to encounter the delay and ex-

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pense of a law-suit at that time, pays the sum demanded under protest—that is, he accompanies the payment by a written and attested declaration of what he deems the illegality of the demand, and of his rights of defence and denial. This protest preserves all those rights, and in any subsequent suit or other effort to get the money back, the protest will prevent him from being impeded by his payment.” In the last edition of Webster’s Dictionary, a similar definition substantially is given. In the Law Dictionary of Burrill, it is declared to be “a solemn declaration against an act about to be done, or already done, expressive of disapprobation or dissent, or made with a view of preserving some right, which, but for such declaration, might be taken to be relinquished,” and it is an old rule in pleading that a party may admit that an act has been done, and at the same time protest that he may not be concluded by his admission in the future enforcement of his rights (Coke Lit. 124 b. ; Finch’s Law, 359, 360 ; Termes de la Ley, 467 ; Plowden’s R. 275).

I concede that where the facts are, in their nature, doubtful, and there is no special reason why the party should make the payment, or the delivery claimed—there being no coercion, concealment, or bad faith on the other side—he must be regarded as deciding a doubtful matter against himself, if he make the payment or the delivery, and he cannot be allowed afterward, in the language of Justice Heath, to repeal his own judgment. But that is not this case. The gold was sent for a special reason. It was accompanied by a protest and reservation of the plaintiffs’ rights, that the act might not be misunderstood and taken to be a delivery under the contract. The plaintiffs, considering that they had delivered the \$5,000 referred to in the defendant’s letter, but not knowing, as may be inferred from the conflicting statements of their own and the defendants’ agents, how the fact might be, sent the gold, as they expressed it, “without any prejudice to their rights,” which, so far from indicating any intention to decide in a doubtful question against themselves, was a very clear intimation that they meant to test, by an action upon the contract, whether their agents had or had not delivered the missing bag, before it was purloined or lost, and that the

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sending of the \$5,000 gold was not meant to be an act of performance under the contract, but an act distinct and apart from it—an arrangement in which, I think, the defendants may not be regarded as acquiescing, as it does not appear from anything in the case that they expressed any dissent or returned any answer. They paid for it, and the plaintiffs no doubt applied the payment upon it as a distinct transaction, and not as a payment upon the contract. My conclusion, therefore, upon this point, is, that the sending of the gold was not, by the intent of the parties, or necessarily by its operation or effect, a delivery of gold under and in pursuance of the contract.

The next point raised upon the motion for a nonsuit, was that, upon the uncontradicted evidence in the case, there was no proof of the delivery of the missing bag, which objection was founded upon several distinct grounds. 1st. That there was no proof of its contents. 2d. That the defendants were entitled to examine it to ascertain the quantity it contained, and it was found to be missing before they could do so. 3d. That if, by the custom, the examination of the tag upon the bag, and the marking of the name upon it, was a substitute for the examination of the contents, then that had not been done. 4th. That payment was to be made simultaneously with the delivery, and that the bag, when found missing, had not been paid for. 5th. That the bag was, at no time previous to the loss of it, out of the reach or control of the plaintiffs' porter, and the delivery of it was therefore not complete.

If, as Corneilson testified, he had the five bags together in a pile, upon the outer side of the counter, with his hands extended around the pile, and with his body leaning over it, and that, while in this attitude and protecting the gold, Wheeler, the gold clerk, came and took each bag separately over to his, the inner side of the counter, and commenced marking them, the gold must be regarded as having been taken into the possession of the defendants' agent, by the physical transfer of it from the custody of the one to that of the other; and if, after this took place—after it was in the actual possession and under the control of the defendants' gold clerk—it was stolen or lost, the delivery of it, on the part of the plaintiffs' porter, was as complete

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as it was in his power to make it. It was taken out of his possession, removed bag by bag, from the secure position in which he placed and guarded it upon the counter, and if the defendants' gold clerk took it and placed it in a position where it was unsafe, and it was thereby *stolen or lost before* he had examined or marked it, its loss is to be attributed wholly to the act of the defendants' agent; the delivery on the part of the plaintiffs being as complete, under the circumstances, as it could be.

A contract of sale, where payment and delivery are to be contemporaneous acts, is not complete until payment is made, but the seller may waive it by an unequivocal delivery of the actual possession, and if he delivers freely and absolutely, without any fraud on the part of the vendee, the condition of payment simultaneously with the delivery is waived, confidence being reposed, and the property passes. (*Smith v. Lyons*, 5 N. Y. 41; *Ward v. Shaw*, 7 Wend. 406.) If the article is placed in the actual corporal possession of the buyer, the seller giving up all hold on the goods, as already in the buyer's possession, and at his disposal, the delivery, in the absence of fraud, is complete (Bell's Contract of Sale 116). "When," says Justice Blackburn, "the seller gives to the buyer the actual control of the goods and the buyer accepts such control, he has actually received them." (Blackburn's Contract of Sale 23.) Such was the case here. The bags of gold were given to the defendants' gold agent, who accepted the control of them, and while under his control one of them was stolen or lost. This having occurred, it was no longer in the plaintiffs' power to reclaim the property, upon the defendants' refusal to pay for it. They put their refusal upon the ground that it had never been delivered to them, while the fact was, as the jury have found, that it was lost after the plaintiffs' porter had surrendered and given over to the defendants' agent the custody and the control of it.

Where anything remains to be done by the seller, as where upon a sale of timber, which is to be transported to the place of delivery, and there, before delivery, measured and inspected, which had not been done (*McDonald v. Hewitt*, 15 Johns. 349); or between the buyer and seller, as where out of a larger quan-

tity of an article a smaller quantity is agreed for, which has not been selected, ascertained, or weighed (*Rapelyea v. Mackie*, 6 Cow. 250), and the property in either of these instances is destroyed by fire, the loss is upon the vendor, there being no delivery, actual or constructive—something remaining to be done before a delivery could be made. But in the present case, the five bags of gold had been weighed by the plaintiffs' clerk, and the quantity or value of each, which was \$5,000, was ascertained in the presence of one of the plaintiffs, and marked upon each bag, that being the customary mode among dealers in gold coin of ascertaining the quantity or value. This was done immediately upon the five bags being taken out of the bank, and upon its being done, they were sent to the defendants' office to be delivered; so that when the five bags were taken by the gold clerk, nothing remained to be done by the plaintiffs, nor by the defendants, with respect to ascertaining the quantity, for all the defendants' gold clerk did, upon receiving the gold in their office, was to mark upon the tag of each bag the date and the name of the person it came from. He testified that the defendants never weighed gold; that they never had gold scales in their office; but that the practice was to mark the tags on the bags when a delivery was made, that being the usual custom among the dealers. The defendants' agent, therefore, accepted the five bags, when he took them out of the possession of the defendants' porter, without any question as to the quantity or intention to examine the contents of the bags, or to weigh them; so that the delivery was in all respects complete. The marking of the date and of the name of the person from whom received upon the bags, was an act in no way essential to delivery, but an act simply for the defendants' convenience thereafter, as noting the day when, and the person by whom, each bag was delivered. The bags may, as the defendants claim, have been within the reach of the defendants' porter and within his control, after they were successively taken by the gold clerk and placed by him upon the inner side of the counter, but the question is, in whose custody were they when the missing bag was stolen or lost. They were, according to Corneilson's testimony, well guarded and secured when he had the five together in a pile, and the

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jury, by their verdict, must have believed his statement to be true. When the gold clerk, therefore, took the first bag from the pile, he took it into his custody, and might have placed it wherever he pleased. It was then in his possession, and as the amount which it contained was marked upon it, and as it was not, by the defendants' custom, to be counted or weighed, the delivery of it was complete. He might have taken it and placed it upon the gold shelf, which was inside of the counter, where it would have been secure, and marked it there, leaving, meanwhile, the remaining four in the custody of the plaintiffs' porter, and so on successively, with each of the bags, until they were all placed upon the gold shelf and marked, and by this means have prevented the loss of any one of them. This, very nearly, was the gold clerk's account of what he did; but his statement was in conflict with the testimony of the plaintiffs' witnesses, whom the jury believed. Assuming then, as we must, that the porter's account is the correct one, the gold clerk took each bag successively from the pile which the porter was securely guarding, until he had them all together upon the inside of the counter, where he commenced marking them; and when he did this the delivery was complete, the porter was released from the further care of them, and they were then in the custody and under the control of the gold clerk.

The next objection taken is, that there was not sufficient proof of the contents or value of the missing bag. The proof was ample. All the bags were weighed, as before stated, before they were sent from the plaintiffs' office, and each bag weighed \$5,000 gold. Each bag was weighed on scales and by a weight representing \$5,000 in United States gold coin, which had been in use in the plaintiffs' office since 1864, and by which hundreds of thousands of dollars had been weighed; by which the plaintiffs ascertained the weight of the gold sold or received by them, weighing three, four, or five hundred thousand dollars a day, and sometimes weighing, by the same weight, as many as a hundred bags a day. A bag was never opened unless the weight was found to be light, when it was examined and the contents counted. There was abundant evidence showing that this was the mode by which, among the dealers, the amount or value of

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the contents of a bag was ascertained, and there was no pretense that there was any deficiency in the four bags for which the defendants gave their check. Numerous exceptions were taken as to the admissibility of evidence showing that it was the custom among dealers to buy and sell gold coin in bulk by weight, and to deliver it in bags of \$5,000 gold each, the buyer upon receiving it, putting the name of the person delivering upon the tag or label of the bag, so that he might know upon whom to make reclamation, if the bag should be found deficient in that amount; all of which was not only admissible, but the defendants themselves proved that this was the mode pursued by them when a delivery was made, and that, though some weighed the gold, it was not the general custom.

Clark, one of the defendants' witnesses, was asked, whether, if these five bags of gold had been brought to the inner side of the counter, they would have been in his sight, which was objected to, and excluded. The witness had previously testified that the five bags were not brought to the inside of the counter so far as he knew, and that there was no person between him and the gold counter. He had also described the exact position in which he stood when he saw two persons bring in gold from Meyer & Greve;—that is, that he was leaning against a shelf, six or eight feet from the counter, with his face turned toward the William street door, looking directly over the gold counter, his position being accurately shown to the jury by a diagram of the defendants' office, which was in evidence, and to which the witness referred. He testified that he saw Wheeler, the gold clerk, advance toward the counter, take two bags from the clerk Kirholtz, draw them toward the inner side of the counter, mark them and put them back upon the gold shelf; that he then saw Kirholtz leave the office; that the next thing he heard or saw was Wheeler inquiring for Meyer & Greve, and upon being further interrogated, he said, that he saw the associate of Kirholtz leave the office before Wheeler made the inquiry, and saw him return in about three minutes afterward.

The testimony of this witness was not only in conflict with that of Corneilson, Kirholtz, and Mr. Gentil, the gold broker, but was throughout of a loose and very unsatisfactory character.

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He could not say, positively, whether Wheeler took the two bags from Kirholtz, or Corneilson. He could not recollect how many bags of gold he saw on the counter, but simply that he saw more than two, nor how many bags the associate of Kirholtz put on the counter. He could not and would not identify either Corneilson or Kirholtz as the associate left in charge of the gold, or swear that Corneilson, when pointed out to him in court, was the person whom he saw leave the office, go up the steps, and afterward return; or that when Wheeler took charge of the two bags there was some gold lying on the counter; but the two young men he referred to, were in charge of what was left; but he could not say what was the position of either of them with reference to it, or whether the hands or arms of either of them were around it. He was asked if he took his eyes off the counter, and answered that he supposed he did, and could not recollect anything he had done in that office that day, or how he was engaged, or what were his general duties upon that day. If the question excluded may be regarded as asking for the knowledge of the witness, it was objectionable, as assuming that the witness was or must have been looking upon the counter at the point of time when, according to Corneilson's account, Wheeler had drawn the five bags over to the inner side of the counter, and this is not inferrable from any thing which the witness had previously stated; while, if it called for his opinion, it was properly overruled. It is, in fact, very obvious, both from his previous and subsequent examination, that this question could elicit nothing but a hypothetical opinion from the witness, which was inadmissible. As respects the next exception, it appears that the witness, on the direct, testified positively that he saw Wheeler take the two bags from Kirholtz, but when subjected to a close cross-examination, he would not positively identify either Kirholtz or Corneilson as the person from whom he saw Wheeler draw the two bags of gold, nor identify either of them as the person who went out, or as the associate who remained. On his re-direct, he was asked if he had any doubt in his mind that Kirholtz was the man from whom Wheeler took the two bags. The question being objected to, was excluded, and properly; the witness having previously admitted very fully upon his cross-examination that he had.

It now remains to consider the further grounds upon which the defendant ask for a new trial. The first is that the verdict is against the weight of evidence, upon which it is simply necessary to say what I have already said, that the question of fact involved was one of great doubt and difficulty, which could only be determined by a jury, and that their finding upon it is conclusive upon the parties. In this is necessarily included the objection that the evidence of Corneilson is overthrown by the positive testimony of four witnesses who saw him leave the office, and that having made a false statement in this respect, it was the duty of the jury to have rejected his entire evidence. Whether he had or had not made a false statement in this particular was a question upon which he and these four witnesses were in conflict, and the jury must be regarded as having believed him instead of them. It was a question fairly before the jury, and was put to them very strongly by the judge, who told them that if they should find that Corneilson left the office, then he had deliberately sworn to a falsehood, and his testimony might and ought to be rejected by them. Some of the defendants' witnesses could not identify him as the man whom they saw leave and return again after the bag was missing; and the jury, with the question fairly before them, have believed him in preference to the other witnesses.

Some of the propositions which the judge was requested to charge were embraced in the motion for a nonsuit, and have already been considered and disposed of. Others he did charge, and one not previously considered he refused to charge, to which the defendants excepted, as well as to what he did charge on the subject. The proposition was this: that if the testimony, on the part of the plaintiffs, was balanced by that on the part of the defendants, the defendants were entitled to a verdict. The judge had already charged that the burden of proof was upon the plaintiffs, and that it was incumbent upon them to satisfy the jury that the gold had been delivered to the defendants, which was all that the defendants could ask, for it was equivalent to saying that if the plaintiffs had not succeeded in satisfying them of that, then the defendants were entitled to a verdict. In no view in which the case can be regarded,

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could it, or did it, present the aspect of evenly balanced testimony. It was a mere question of credibility, in which the main witnesses on the part of the plaintiffs were directly in conflict with the main witnesses relied upon by the defendants. The question was, which were to be believed. If the plaintiffs' witnesses gave a true account of what had occurred, the plaintiffs were entitled to recover. If they did not, and the defendants' witnesses told the truth, there could be no recovery by the plaintiffs. It was not a case in which the witnesses on the one side could be regarded as exactly poised or balanced against those of the other in any view which the jury might take of the case. There may possibly be such a thing in a case as a conflict of evidence evenly balanced, but not, I apprehend, where the question is whether one witness upon the one side or four upon the other, have sworn to the truth. The witnesses were not numerically balanced; and if they were, it would make no difference, for a jury may be better satisfied with the statement of one witness than with the conflicting evidence of a dozen. The judge, upon refusing to charge as requested, told the jury that it was their duty to reconcile the evidence if possible; that if it was so nicely balanced that it was difficult to tell which way the scale was, they were still to determine where the preponderance of evidence was, and turn the scale there; to which the defendants excepted. This was yielding more to the defendants' proposition than was necessary in a case where the conflict arising presented simply the question of credibility of the respective witnesses, and, taken in its fullest extent, it was nothing more than telling the jury that it was for them to determine where the preponderance lay, to which I cannot see any objection, if the defendants were not entitled, as I hold they were not, to have their proposition submitted to the jury.

The judge was asked to charge that if the plaintiffs were entitled to recover, no recovery could be had for the premium on gold, which he refused to do, and the defendants excepted. The price of the gold was fixed by the terms of the contract, and I know nothing in the law which forbids parties to sell gold, whether it is in bullion or in coin, at any price which they

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think proper to agree upon, or which would make such a contract invalid. With respect to the bag delivered on the 29th of September, it was sent by the plaintiffs' letter at 212½, and was paid for, it is to be presumed, at the same rate as the other four, nothing to the contrary appearing.

The exception to that part of the charge in which the judge told the jury that it was not necessary, under the circumstances disclosed by the plaintiffs' case, that Wheeler should have completed the marking of all the tags of the bags, to place the gold at the defendants' risk, and that if the bags were drawn to the inner side of the counter in the manner described by Corneilson, there was such a taking of the physical possession of the bags by the defendant as made the delivery complete, and placed the gold at the defendants' risk, merely raises two points which I have already sufficiently considered and passed upon.

The subsequent conduct of Corneilson, and his employment by the plaintiffs, was not received in evidence under exception, as was the case in respect to the evidence which the judge in *Erben v. Lorillard* (19 N. Y. 299), afterward in his charge directed the jury to disregard. As this was evidence which had been given without objection, I am not prepared to say that it was error in the judge to tell the jury that they might take it into consideration, when weighing the question of Corneilson's credibility, a matter in respect to which the jury have a wide range; but if it were, it was no sooner excepted to, and the judge's attention called to it, than he said that there might be some doubt about the propriety of that instruction, though he had none himself, and that he retracted it. This was very different from the case above cited; the rule there applied, in the language of Justice Grover, being that "when illegal evidence, properly excepted to, has been received during a trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed; that if the evidence may have affected the verdict, the error cannot be disregarded;" and that it necessarily did in that case may be inferred from the remark of Chief Justice Denio, that, except upon that evidence, it was difficult to account for the verdict. It was the same in the three other cases relied upon (*Penfield v. Carpenter*, 13 Johns.

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350; *Haswell v. Bussing*, 10 *id.* 128; *Irvine v. Cook*, 15 *id.* 239), in all of which evidence was improperly admitted under objection, and as was said by the court in the first of these three cases (*Penfield v. Carpenter*), no subsequent caution or advice by the judge, that the jury ought to disregard what the witnesses had sworn to, could cure the irregularity. It is very different, however, when a judge tells a jury that they may consider certain evidence which is in the case in its bearing upon the credibility of a witness, but when his attention is called to this particular instruction, he weighs the matter more deliberately, and upon fuller reflection tells the jury they are not to consider it. This is the very reason why an exception to any part of a judge's charge, to be available, is required to be taken at the trial, that an opportunity may be afforded, before the case is finally submitted to the jury, to correct any error or mistake which the judge may have made in the instructions given. In the one case judges can, and constantly do, correct errors or mistakes in their charges when their attention is called to them; but in the other case evidence objected to as improper is received, and may, being sworn to, have an affect upon the minds of the jury, an affect not necessarily overcome or eradicated by the judge telling the jury afterward to disregard it.

This, I think, embraces all the questions raised upon the motion for nonsuit. The judgment should be affirmed.

Lockwood v. Bostwick.

LOCKWOOD *et al.* v. BOSTWICK *et al.*

A party will be restrained by injunction from using a label as a trade-mark, resembling an existing one in size, form, color, words, and symbols, though in many respects different, if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when the two were compared, and yet not so much so, that the difference would be detected by an ordinary purchaser unless his attention was particularly called to it and he had a very perfect recollection of the other trade-mark.

It will be inferred in such a case, that the design was to obtain in the manufacture and sale of an article, any benefit or advantage that might be gained by its being purchased for another article of the same description which was known in the market, and a court of equity will protect a party from any such attempt on the part of a rival, to reap the fruits of the enterprise and industry of the other, in making his fabric known and recognized by a distinctive trade-mark.

The sale or transfer of the wood-cuts of a trade-mark does not carry with it the property in the trade-mark itself, unless under circumstances indicating that such was the intention, and this will not be inferred where they were transferred to be used in the printing of labels to be placed upon an article which, by agreement, was to be manufactured under the supervision of the proprietor of the trade-mark.

There is a right of property in a trade-mark which may be transferred to another by assignment.

SPECIAL TERM, *September*, 1869.

THIS was a suit for an injunction to restrain the defendants from using a label bearing the name "*Bovina*," on the ground that it was an imitation of a label used by the plaintiffs, bearing the name "*Boviline*," the labels having, also, otherwise, a close resemblance to each other. The case was tried before Daly, First Judge.

The complaint set forth the following state of facts: That the plaintiffs composed the Gray's Patent Steam Clarifying Association, and were the assignees of a company which owned the patent for a certain apparatus used for purifying lard and tallow, known as the Gray's Steam Clarifying Apparatus; that the said company had, in the early part of the year 1864, effected an arrangement with the defendants, by the terms of which the latter were to use the said apparatus in manufactur-

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ing an article of hair pomade, and were also to sell and dispose of the said pomade in the market, under the general supervision of the company; that, before making these agreements, the company had agreed upon and adopted, as a trade-mark and label for the proposed pomade, an engraving of a particular kind, with the name and title of "*Boumeline*," but at the time of employing the defendants, had changed the name to "*Boviline*," and had selected a peculiar ash-color for the label; that afterward the defendants canceled their agreement with the company, and proceeded to manufacture on their own account a similar pomade, calling it "*Bovina*," and putting forth a label of the same color as the plaintiffs', and with a like engraving upon it, and similar in other respects: that, about the same time, the said company made an assignment of all its property to the plaintiffs, who at once began manufacturing "*Boviline*," and gave defendants notice thereof. The complaint also alleged that the engraving on the "*Boviline*" label represented the apparatus aforesaid, which was used in rendering the lard and tallow from which the pomade was manufactured, whereas the engraving on the "*Bovina*" label represented no apparatus at all, and was only used as an imitation.

The answer denied the resemblances of the two labels, and set forth that the alleged arrangement between the company and defendants left the company no control over the pomade business, which became exclusively the property of defendants, and that they (defendants) organized said business, and invented and got up the labels, etc., etc., and were the sole proprietors of the "*Boviline*" trade-mark, and that they had changed the name to "*Bovina*" for certain copyright purposes.

It appeared on the trial that the distinctive feature of the "*Boviline*" label was the engraving representing the aforesaid apparatus, and that this had been adopted by the company as a general trade-mark in all its business, and had been put upon their seal, and that the seal had been varied by adding the name "*Boviline*," for the purpose of impressing it upon the corks of the pomade bottles.

It also appeared that the label, as originally devised, was in other respects, except as to the name "*Boviline*," the same as

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afterward used in the first manufacture of the pomade; and that a member of the company had arranged and prepared it, and had used the name "*Boumeline*" at the suggestion of Prof. Owen, the Greek Professor of the Free Academy,—that word being compounded of "*Bou*" and "*myelos*" meaning *ox-mar-row*; but that the name was changed to "*Boviline*" at the request of the defendants when they began manufacturing for the company.

It further appeared that the defendants had purchased the wood-cuts of the "*Boviline*" engraving from the president of the company, and that, on canceling their agreement, they retained the possession of these; and they exhibited in court one of the company's seals bearing the "*Boviline*" trade-mark. The evidence was undisputed, however, that the defendants had, after the said cancellation, recognized the company's ownership in the trade-mark and designs for the cuts or engravings.

Henry Everett Russell, for plaintiffs, cited on the question of *simulation*, *Crowshaw v. Thompson* (4 M. & G. 385), referred to in *Fettridge v. Merchant* (4 Abb. 159); and on the question of *title*, 25 American Jurist, 279, and *Fettridge v. Merchant* (4 Abb. 160); and argued that the sale of the wood-cuts was no sale of the *design* of the engraving, unless distinctly so specified; for that the right to use the engraving as a trade-mark was separate from the engraving itself, and this right of user being the essential element of the plaintiffs' property in their trade-mark, no transfer of it was to be presumed.

A. Dana Wells for defendants, cited *Patridge v. Menck* (2 Sandf. Ch. 622); *Amoskeag Co. v. Spear* (2 Sandf. S. C. 599); *Williams v. Johnson* (2 Bosw. 1), and *Upton on Trade Marks*, 199; and argued that the defendants had the exclusive right to the use of the name "*Boviline*" and its label.

DALY, F. J.—The defendants were simply the servants of the company during the period covered by the agreement. The transfer of the wood-cuts to the latter was simply to enable them to place the labels upon the pomade manufactured by

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them under the company's supervision, and was not intended to, and did not, have the effect of transferring to the defendants any property in the trade-mark. In fact the defendants by their own acts afterward acknowledged the company's continuing ownership and right to use the trade-mark. An inspection of the two labels shows that the one afterward used by the defendants, and the use of which the plaintiffs seek to restrain by injunction, was, in respect to form, color, words, and symbols, so like the former as to make it manifest that the design of the defendants in using it was to deceive, the resemblance being such as would be likely to impose upon ordinary purchasers, according to the rule recognized in *Crowshaw v. Thompson* (4 Mann. & G. 385). It was alike in the size and form of the label; in the color of the paper, a peculiar, delicate gray tint; the machine or apparatus represented was one that had no existence in fact, but resembling the real machine sufficiently for the difference to escape observation unless upon attentive examination; and the word "*Bovina*" was substituted for "*Boviline*," printed in the same type and in exactly the same place as the other at the head of the label. The design evidently was to depart from the other sufficiently to constitute a difference when the two were compared, and yet to do it so skillfully that the difference would not be detected by an ordinary purchaser unless his attention were particularly called to it and he had a very perfect recollection of the other label. The design was to deceive, and to obtain, in the manufacture and sale of the article, any benefit or advantage that might be gained by its being purchased for another article of the same description, which was known and distinguished by a particular trade-mark. There could be no other motive, and it was done with the shallow expectation, that the law would not see through the motive, but pronounce that the two labels were not the same, by simply distinguishing the points of difference between them. So far as the object sought could be attained, it would operate to the plaintiffs' detriment by diminishing the sale of their articles in the market, and they are entitled to be protected by a court of equity from this attempt on the part of rivals to deprive them of the fruits of their industry or enterprise in mak-

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ing their own fabric known and recognizable by its distinctive trade-mark. There is a right of property in a trade-mark which is capable of being transferred to another, and the right and title which the company had to this trade-mark passed to the plaintiffs by the assignment.

The motion to dissolve the injunction is denied, and the plaintiffs are entitled to judgment.

IN THE MATTER OF THOMAS BYE, AN ALIEN.

A native of Holland came to this country, and after remaining here nine years, returned to Holland, was married there, and for six years followed there the occupation of a mariner. He then returned to the United States, and for fifteen years was employed as a mariner continuously in American vessels, and for the last five years sailed exclusively in a vessel belonging to the port of New York, his wife during all the time being in Holland, where she was supported by the applicant who had frequently solicited her to come to this country with her children to live, but who preferred to remain there from a natural dread of venturing upon the ocean.

Held, that the applicant had resided five years in the United States, and one year in the State of New York, within the meaning of the naturalization law, and was entitled to be admitted a citizen.

A foreigner continuously and exclusively employed in the vessel of a nation, may by length of time acquire a residence in that nation as effectually as though he had remained upon the land within its boundaries. Vessels are subject to the jurisdiction of the country to which they belong, and for certain purposes are regarded as part of its territory.

Every human being has a fixed domicile, which is the place where his parents lived at the time of his birth, and which continues until he acquires another, and the supposed exceptional cases of gypsies, vagrants, or wandering outcasts, who do not know where or when they were born, are not exceptions to the rule, for their place of birth, if known, is their domicile, and if not known, it is the place of which they have the earliest recollection, or beyond their recollection, where they were first known and seen by others.

Residence is usually the result of a man's voluntary acts, and whether he has acquired one, in the sense of domicile, depends less upon general rules than upon the circumstances of his individual case. It is more a question of fact than of law.

If it is usual with a mariner to ship in any vessel, indifferent as to the country to which she belongs, or as to the part of the world in which he may find himself

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when his contract ends, it will be inferred that no intention existed to change his domicil, but to suffer that to continue which he acquired at his birth, or had when he first became a mariner; *otherwise*, when his acts clearly indicate an intention to make some particular place or country his residence, or when he confines himself in his calling for many years exclusively to the vessels of a particular nation, repeatedly declaring during that time his intention to continue in that country for the remainder of his life.

If a married man, his residence is the place or country where his wife or family dwell, but this is not conclusive in all cases. A man's wife cannot control his right to fix his permanent place of abode in any part of the world to which his interest or inclination may lead him. It is her duty to follow him, and abide in the place where it is most convenient for him to enjoy her society, and where he is willing to provide for her and his children.

SPECIAL TERM, *September*, 1869.

THIS was an application on the part of Bye to become a citizen of the United States. The facts appear in the opinion of the court.

DALY, F. J.—The applicant is a native of Holland, and is now forty-nine years of age. He came to this country thirty years ago as the steward of an American vessel, and remained residing here continuously for nine years. He then went to sea, and twenty years ago was married at Mastenbroek, in Holland, where his wife and two of her children have ever since resided. For five years thereafter he sailed in foreign vessels, chiefly from ports to and from Holland, occasionally visiting his family for short periods as his occupation would permit. About fifteen years ago he returned to the United States, and has ever since been employed as a mariner in the merchant marine of this country, sailing for the last six years exclusively in vessels belonging to the port of New York, during which time he has seen his wife and family but twice, upon leave of absence granted to him while employed on board American vessels that were temporarily at the ports of Rotterdam and Antwerp. He has had no rupture with his wife and family, but, on the contrary, has transmitted to them regularly an adequate portion of his wages for their support. He has repeatedly solicited his wife to come with her children to this country and live in the city of New York, which is now and has been practically his

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home when upon shore for the last fifteen years, but she has preferred to remain at Mastenbroek, where she was born and married, having, in addition, a natural repugnance to or fear of venturing upon the sea. His return to this country was induced by the circumstance that he could do better here than in Holland, and it is now and has long been his intention to continue here for the remainder of his life, being very much attached to a country where his industry has met with a greater reward, and where his prospects for the future are better, than in the country of his birth. Three years ago his eldest child was sent here at his request, voluntarily, by his wife, and is now supported by him in this city. In November, 1861, he declared his intention in this court to become a citizen of the United States. He was then employed as the chief mate of a vessel belonging to this port, in which he has continued ever since. The owners of this vessel wish and intend, if he becomes a citizen of the United States, to appoint him to the responsible position of master. They give him a high character for fidelity, integrity, industry, and capacity.

We have repeatedly held, in this court, that a mariner of foreign birth, who has been employed exclusively in American vessels for five years continuously prior to his application to be admitted a citizen, and who, for the last year of that term, has shipped only in vessels belonging to the port of New York, is, within the meaning of the naturalization laws, to be deemed a resident, during that term, of the United States, and a resident of this State for one year, unless there are circumstances which show that he has maintained and kept up his previous residence (*In the matter of Scott*, 1 Daly, 534; *In the matter of Hawley*, Id. 531; Dunlap's Laws of the United States, pp. 307, 493, 494, 1167; Story's Conflict of Laws, secs. 42 to 48).

A foreigner, continuously and exclusively employed in the vessels of a nation, may, by length of time, acquire a residence in that nation as effectually as though he had remained upon the land within its boundaries; for vessels are subject to the jurisdiction of the country to which they belong, and, for certain purposes, are regarded as part of its territory; as in the case put by Vattel of a child born in the vessel of a nation upon the

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high seas, which, he says, may be reputed to be born in its territories (Vattel, B. 1, c. 19, sec. 216, and see Laurence's Wheaton, p. 209).

Every human being has a fixed domicile. Originally it is the place where his parents lived at the time of his birth, which continues until he has acquired another; for although there are supposed exceptional cases (Vattel, B. 1, c. 19, sec. 219; Cochin, t. 1, p. 184; Felix Droit Int. Prive, t. 1, sec. 29, n. 2), as gypsies, vagrants, or those wandering vagabonds or outcasts who do not know where or when they were born, it is not so in fact; for the place of birth when known is the domicile (1 Bl. Com. 366, 369; Story's Conflict of Laws, sec. 48); or, if not known, then it is the place of which the individual has the earliest recollection, where he was first seen and known by others. Unless an individual is controlled by circumstances, his residence, using that term in the sense of domicile, is the result of his own voluntary acts, and the question whether he has or has not acquired one depends less upon the application of any general rules than upon a consideration of the circumstances of his individual case. It is, as Lord Loughborough said in *Bempde v. Johnstone* (3 Ves. 251), more a question of fact than of law. If he is a mariner, his calling is one that compels him, as a means of livelihood, to traverse the sea from one port or place to another, and, while the voyage continues for which he has shipped, his place of abode is the vessel to which he belongs, whether she is temporarily in port or pursuing her course over the ocean. In the short intervals that elapse, in following such a vocation, between the termination of one voyage to the beginning of another, his place of abode is necessarily upon the land, but he does not change his domicile or acquire a new one, unless his acts clearly indicate that he has done so by making some one particular place or country his residence, with no present purpose of changing it.

If it is usual with him, when out of employment, to ship in any vessel, the master of which will engage him, wholly indifferent as to the place or country to which she belongs, or as to the part of the world in which he may find himself when the contract is at an end, then it is inferable that no intention ex-

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isted to acquire a new domicile, but to suffer that to continue which he had when he commenced his vocation as a mariner. Another circumstance, and generally a controlling one, is that he is a married man whose residence is naturally at the place and in the country where his wife and family dwell (Pothiers, *Contumes D'Orleans*, c. I. sec. 20, 15). But this is not conclusive in all cases (*Forbes v. Forbes*, Kay, 341; Phillimore on Domicil, sec. 203; Story's Conflict of Laws, sec. 46), for it is not in the power of a man's wife or family to control his free right to fix his residence and place of permanent abode in any part of the world to which his interests or his inclination may lead him. It is the wife's duty to follow the fortunes of the husband; to go "whither he goeth" and abide in that place where it is most convenient for him to enjoy her society, and where he is able and willing to make provision for her support and that of his children.

The circumstances of the present case show that the applicant, Bye, is not to be classed with those mariners who are indifferent to the nationality of the vessel they engage in; to whom any ship is acceptable when the stipulated wages are paid, wherever she is found, whatever may be the flag she bears, or whither she may be going. On the contrary, he has limited himself, for the last fifteen years, in the pursuit of his calling, to the vessels of the United States. He has done so from interest and inclination; he has resided here for nine years in the youthful part of his life, and now, after the test of fifteen years of service in the merchant marine of this country, it is his fixed intention to continue here for the remainder of his life, an intention not simply gathered from his avowal now, but one repeatedly expressed heretofore to the owners of the vessel by whom he is at present employed, which he has also expressed to his wife and manifested by his efforts to induce her to come over to this country with the younger children and live with him here.

If, as is evidently the case, he finds it to be his interest to continue here in the employment in which he has been engaged for so many years, he should not be deprived of the benefits and advantages attendant upon a continuous residence in this

In the Matter of John Percy.

country, among which is the right of becoming a naturalized citizen, because his wife is unwilling to come here and take up her abode with him. In my judgment, he has been for the last fifteen years a resident of this country and for the last five a resident of this State, and is entitled to be naturalized (*Guier v. O'Daniel*, 1 Bin. R. 349; *Kotza's Case*, Sen. Doc. 1).

IN THE MATTER OF JOHN PERCY.

Upon *habeas corpus*, in a case of a commitment for a contempt, the judge is limited to the inquiry, (1) is the contempt specially and plainly charged in the commitment; and (2) had the officer authority to commit for the contempt charged. If these appear, the prisoner must be remanded.

An order made by the court is a sufficient commitment, where the contempt has been committed in the presence of the court.

Whether the order should not direct the sheriff to take the prisoner into his custody and confine him,—*query?*

Although the commitment is defective, yet, where it appeared upon the hearing that the prisoner was guilty of a criminal offense, the proper course is for the judge to discharge him formally from the imprisonment and recommit him, or, in this State, as provided by statute, to remand him.

A commitment for a contempt committed in the presence of the court is an adjudication of an action for a criminal offense, and is, therefore, not bailable.

SPECIAL TERM, *September*, 1868.

THE relator, Percy, an attorney, was, by the order of Justice Barnard, of the Supreme Court, committed to the county jail for thirty days, for contemptuous conduct in the view and presence of the court. He sued out a writ of *habeas corpus* in the Court of Common Pleas, and moved for his discharge upon the ground that the order for his committal was illegal and void.

John Percy, in person, for the motion.

A. Oakey Hall, District Attorney, opposed.

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DALY, F. J.—It is declared by statute that if it appear by the return to a writ of *habeas corpus* that the party suing out the writ is in custody for any contempt specially and plainly charged in the commitment, by some court, officer, or body having authority to commit for contempt so charged, that the officer granting the writ shall immediately remand the party (2 Rev. Stat. 567, p. 40). And it is further provided that no court or officer shall have power to inquire into the justice or propriety of any commitment for a contempt made by any court, officer, or body according to law, and charged in such commitment (Id. sec. 42). The return shows that Percy is detained in the Eldridge street jail, in pursuance of an order made by Justice Barnard, in the Supreme Court, imposing a fine of \$200 for behavior on the part of Percy, in the immediate view and presence of the court, tending to interrupt its proceedings and impair the respect due to its authority. The order, in compliance with the statute (2 Rev. Stat. 278, sec. 13), sets forth the particular circumstances of the offense, and directs that Percy stand committed until the fine is paid, for a period not exceeding thirty days, and as all this appears upon the face of the return, my plain duty, as it appears to me, is to remand him. My inquiry is limited by statute to two points: (1) Is the contempt specially and plainly charged in the commitment? (2) Had the officer authority to commit for the contempt which is charged? In respect to the first, the circumstances are set forth in the order of commitment, and they amount to a criminal contempt, as the offense is defined by the Revised Statute (2 Rev. Stat. p. 278, sec. 10), and in respect to the second, a justice of the Supreme Court has authority to commit for such a contempt.

It is objected that there is no commitment in this case; that Percy is held under an order of the court, and that the statute, therefore, is inapplicable. Courts of record, however, might always commit for contempt by an order. It was decided in the case of *The People v. News* (1 Hill, 154), that this power was not only not taken away by the Revised Statutes, but that it was distinctly recognized by the provision therein enacted upon the subject of contempts. Where the court, therefore, makes an order that a party be committed for contempt—com-

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mitted in the presence of the court—the order is, for all the purposes of the statute, to be regarded as a commitment (*The People v. Nevins, supra*, p. 171). Lord Hardwick said in *ex parte White Church* (1 Atk. 57), that when the order of court is made, the party stands committed for the contempt; that it is different from process, and if the party is present in court when the order is pronounced, he is instantly a prisoner, and the warden may take him away to jail directly; and see, to the same effect, *Mayhew v. Locke* (2 Marsh. 380, per Gibbs, C. J.) and *Throgmorton v. Allen* (2 Rolles Abm. (c), p. 558); *Taylor v. Beale* (id. p. 559).

The statute declares that the punishment for a criminal contempt of this description may be by fine or by imprisonment in the jail of the county where the court is sitting, or both, in the discretion of the court, and it is therefore objected that the order does not state by whom it is to be carried into effect, or declare where Percy is to be imprisoned. It was decided in *Russell v. Hubbard* (6 Barb. 654), that a warrant of commitment by a justice of the peace, upon a conviction for petit larceny, was void which was not directed to any officer, or class of officers, or person authorized to execute it, and that it afforded no protection to the constable who actually executed it. It may therefore be doubted whether the order made by the court in this case should not have directed the sheriff to take the relator and confine him in the jail of the county for thirty days, or until he paid the fine, but the point is one that it is not necessary for me to pass upon, for even conceding that the order of commitment was defective in this respect, it would not avail the relator upon a writ of *habeas corpus*, for the statute declares (2 Rev. Stat. p. 568, sec. 43, 44), that if it appear upon the hearing that the party was guilty of a criminal offense, the court or officer before whom he is brought shall remove him, if the offense is not bailable, to the custody of the officer or person by law entitled thereto, even though the commitment was irregular, and this was the rule of the common law; the practice being, if the commitment was defective, to formally discharge the prisoner from the imprisonment and then recommit him for the offense (*The King v. Mark*, 3 East R. 160). The contempt appearing here

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upon the face of the return is, by statute, declared to be a criminal offense (2 Rev. Stat. pp. 278, 279, secs. 10, 15), and being an adjudication and conviction for a criminal contempt it is not bailable (Petersdorf on Bail, p. 392). He must be remanded to the custody of the sheriff, and seek his remedy by appeal for any defect in the order of commitment, for in a case like this it constitutes no ground for his discharge upon *habeas corpus* (*Bethel's Case*, 1 Salk. 34).

The last objection made is that it does not appear that any interrogations were propounded. This is also a matter that cannot be inquired into upon *habeas corpus*. Where the order is one which the court have authority to make, all jurisdictional steps and all matters of regularity are to be presumed. A contrary doctrine, says Cowen, J. in *People v. Nevins* (*supra*), would turn a *habeas corpus* into a writ of error to revise the proceedings of court. It may be remarked, however, that the propounding of interrogations are not necessary where the contempt is committed in the view and presence of the court. The court takes judicial notice of the fact, and the conviction and punishment are summary (2 Rev. Stat. 278, § 12; *Pitt v. Davidson*, 37 Barb. 97.)

Percy must, therefore, be remanded.

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Where an action for the dissolution of a copartnership and an accounting is brought, and the parties settle the suit without the knowledge of the plaintiff's attorney, the court will not order the appointment of a receiver of the partnership property to secure the lien of the plaintiff's attorney.

All that the court will do, in such a case, for the protection of the attorney's lien, will be to allow him to proceed in the suit and enter up judgment for the amount of his costs.

SPECIAL TERM, August, 1869.

THIS was an action for the dissolution of a copartnership and for an accounting. The parties, plaintiff and defendant,

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settled the suit without consulting the plaintiff's attorney, who now applied for the appointment of a receiver of the partnership property to secure his lien for the payment of his costs.

C. Goep, for the plaintiff.

—— ——— for the defendant.

DALY, F. J., said that the attorney had no lien upon the partnership property. The extent to which the courts had gone to enforce the equitable lien which the attorney had for the payment of his costs was to allow the attorney to go on and enter up judgment for the amount of his costs. A receiver is not appointed in actions for the dissolution of a partnership as a matter of course, but only where such a measure is absolutely necessary to protect the property in cases where there is proof of such a breach of the partnership duty as to warrant the apprehension that the other party may make way with the property or carry on the business solely for his individual benefit, so as to impair or wholly defeat the object for which the suit was brought. It is the policy of courts of equity, moreover, in such cases, to encourage the parties to come to some arrangement which might dispense with the aid of the court, in view of the delay, expense, and loss which is inevitable if resort must be had to extreme equitable remedies to determine and enforce the rights of the respective partners. The settlement of the suit, therefore, by the partners was to be regarded favorably, and the court would not order the whole of the partnership property into the hands of a receiver, because they had, in their settlement, omitted to pay or to make any provision for the payment of the costs of the attorney. As the attorney notified the defendant, before the settlement, of his claim for costs, the court would allow him to go on in the suit and enter up judgment for the amount of the costs. This is the extent of his remedy and one that would be as complete or effectual as any judgment is in an ordinary action.

Motion denied.

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WILLIAM R. ROBERTS *vs.* FRANCIS J. GEIS *and others.*

Where a lessee agrees to assign his lease, which contains a condition that the landlord may re-enter in case of alienation, he impliedly agrees that he either has obtained, or can and will obtain, such consent of his landlord as is necessary to enable him to vest in the assignee the same estate which he has himself.

Whether, in such a case, the lease is only voidable at the option of the landlord, or absolutely void upon a breach of the condition, is immaterial. To render the transfer effectual so as to vest the assignee with the remainder of the term, whether the latter knew of the covenant against an assignment or not, the landlord's consent is necessary, and in the absence of such consent being obtained, the lessee cannot compel the assignee to complete the transfer and pay the consideration.

SPECIAL TERM, *July*, 1869.

THIS action was brought to compel a specific performance of an agreement entered into by the defendants to purchase, and take an assignment of, a lease of certain premises of which the plaintiff was the lessee.

The agreement provided that the defendants should take the lease, subject to the conditions and restrictions contained in it. One of the conditions contained in the lease was that if the lessee should sell or assign the lease, the landlord might, at his option, terminate the lease and re-enter. There was no pretense of bad faith on the part of the plaintiff, or that the condition was concealed from the knowledge of the defendants. The latter, however, testified, that in examining the lease before the execution of the agreement, they did not observe the provision against alienation, and did not know of it until afterward.

Frederick Smyth and Edgar S. Van Winkle, for plaintiff.

A. F. & W. H. Kirchois, and *Jacob A. Gross*, for defendants.

DALY, F. J.—In *Mason v. Corder* (7 Taunt. 9), the lease contained a covenant not to assign without the lessor's consent

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in writing. The action was to recover damages from the defendants for the non-performance of an agreement to purchase the residue of the term of the lease, and it was held, that, to maintain the action, it was incumbent upon the plaintiff to show that he had done all that was requisite on his part, namely, that *he had obtained the lessor's consent in writing to the assignment.*

In *Lloyd v. Crispe* (5 Taunt. 250), there was a covenant in the original lease that the lessee should not assign without the license of the lessor. The plaintiff, with the knowledge of the existence of this covenant, made an agreement with the lessee for the assignment of the lease, and paid upon it the sum of £50. The lessor refused to give his consent, and the plaintiff brought an action against the lessee to recover back the £50. The defendant insisted that he had not contracted to obtain the lessor's consent to the assignment; that it was incumbent upon the plaintiff, who had full notice of this covenant in the lease, to procure the consent; that as the defendant was willing to assign his lease if the plaintiff would accept it, and to receive the residue of the purchase-money, he had done all that he had contracted to perform, and that the plaintiff could not recover back the deposit. Sir James Mansfield, upon the trial, was of the opinion that the plaintiff, as he had *had all the covenants in the lease read over to him*, and was perfectly cognizant of the restriction against alienation, he had taken upon himself to obtain the landlord's consent, and the lessee had only agreed to part with his interest in the term, as far as he was able to do so. He accordingly directed a nonsuit. But, upon a motion for a new trial, all the other judges thought otherwise. They were of the opinion that the plaintiff, not being able to enjoy the premises, had paid the £50 for nothing. That it was the lessee's business to obtain the landlord's consent and not the plaintiff's, and that he might recover his £50 back. A new trial was therefore ordered. In accordance with these decisions, it is laid down as the general rule, in Mr. Platt's very accurate treatise upon the Law of Covenants (p. 442), that the vendor of a lease containing such a covenant, and not the vendee, is bound to obtain the landlord's consent to the assignment.

These two decisions are decisive of the present case. The latter one is exactly in point, for the ground there taken is substantially the same as that which is relied upon by the plaintiff in this case.

It is suggested in the plaintiff's points, that there is a distinction between cases where the term is put an end to, and the lease becomes absolutely void by the breach of a condition or limitation contained in it, and cases where it is merely voidable; as where the covenant is that the landlord may re-enter, if the condition is broken, which is true (3 Co. 64. 1 Inst. 214, b); and it is, therefore, argued, that if, by the terms of the lease, an assignment without the landlord's consent would render it thereafter absolutely void, it is necessarily implied that the lessee will obtain the landlord's consent before making the assignment, for the reason that an assignment without it would wholly destroy the subject-matter, and nothing would pass to the assignee under it; but that, where the condition is that if the lease is assigned, it shall be at the landlord's option to put an end to the term, or to re-enter, the assignment may be good, for the landlord may never exercise his option, or he may waive the condition by accepting rent from the assignee. That, in accordance with this view, the two cases referred to are to be distinguished as cases where the lease became absolutely void by an assignment without the landlord's license or consent; but that, in the present case, it would be merely voidable at the landlord's option, which makes an essential difference, as in the one case there would be at least the possibility of something to assign, and in the other there would not be. But the decision in these cases was not founded upon any such distinction, nor is there anything in the report of the cases from which it could be inferred that the leases there would have become absolutely void, by a breach of the condition against assignment. On the contrary, in cases where the language of the condition was equally strong—even stronger—as where it contained an express provision that, upon the breach, the lease should be utterly void, and there was nothing expressed in respect to re-entry, or any other qualification, it has been held that a breach of the condition would not render

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the lease void, but voidable merely at the landlord's option. In *Doe v. Banks* (4 B. & Ald. 402), the condition was that if a certain period should elapse without the lessee performing what he had engaged to do, the lease should be deemed void to all intents and purposes; but C. J. Abbot said that, notwithstanding the words of the lease, it did not become absolutely void unless the landlord saw fit to make it so. In *Reed v. Farr* (6 Maule & S. 121), the language was equally strong, and the ruling was the same; and in *Roberts v. Dovey* (4 B. & Ad. 664), the license, on breach of a certain condition, was to cease, determine, and become utterly void, and of no effect. And yet it was held that it did not become void until the landlord had declared his option. To the same effect is the language of Lord Tenterden in *Arnsby v. Woodward* (6 B. & Cres. 519), and the case of *Malins v. Freeman* (4 Bing. N. C. 395), which was decided on a similar principle; to which it may be added, that, in accordance with these cases, the law is thus laid down in Archbold upon Landlord and Tenant (97): "Even although, by the terms of the proviso, the term is to cease, or to become void for the non-performance of the covenants, if the landlord do not avail himself of it, the term continues as before."

This will become even more apparent upon considering other provisions of the law in respect to enforcing forfeitures for the breach of covenants against assigning or underletting without the landlord's permission. "Covenants of this description," says Platt in his Treatise on Covenants (p. 406), "have always been construed by courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation." Thus, to enable the landlord to enforce a forfeiture for underletting or assigning without his consent, there must be a provision for a re-entry, or that the estate shall be void upon the breach of the condition; for, in the absence of a proviso for a re-entry, or what is equivalent to it, he would possess no such power. It would not be a good condition, but a mere covenant or agreement, for the breach of which his only remedy would be an action for damages (*Wilson v. Phillips*, 2 Bing. 13; 4 Cruise's Digest, p. 353, §§ 1, 3; Co. Lit. § 331;

Shep. Touchstone, 122; Platt on Covenants, 426; Archbold on Landlord and Tenant, p. 95).

Now, in one of these two cases (*Lloyd v. Crispe*) there was a proviso for a re-entry, which shows that in that case the lease was voidable only at the option of the landlord; so that no such distinction as that which is relied upon by the plaintiff's counsel here could have affected the decision in that case. In the other (*Mason v. Corder*) it does not appear whether there was or was not a proviso for a re-entry, or that the lease should be void upon the breach of the covenant not to assign; nor is it material, for the case was decided expressly upon the authority of the previous case of *Lloyd v. Crispe*. The fact is, that both cases were decided upon this plain ground, that when a lessee agrees to assign his lease, an act, which, if done without his landlord's consent, would place it at once in the landlord's power to put an end to the lease, it is to be assumed that he either has, or can obtain, or engages to procure, his landlord's consent, which is necessary to enable him to vest in the assignee the same estate which he has himself, and which is what he engages by an assignment to transfer. By assigning the house, without the landlord's consent, he transfers the estate, charged with a breach of one of the conditions upon which it was to be enjoyed, which is very different from what he possessed himself, as it may then be divested, and the assignee deprived of all right and interest in it, at the landlord's pleasure. It is obvious, therefore, that to render the transfer effectual, whether the assignee knows of the covenant against assignment or not, that an assignment, duly executed, should be given, with the landlord's consent endorsed upon it, or otherwise expressed in writing for the assignee's security, and to vest in him what remains of the term.

The provision in the lease, as I recollect it, for I have not the instrument now before me, is that the term should expire at the option of the landlord, upon the premises being let, demised, underlet, assigned, or sold without his written consent. This is equivalent to a proviso for a re-entry, whether the words re-entry are or are not in the lease (Bacon's Abr., Condition A, G, H; Shephard's Touchstone, 122). I understand,

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however, from the points of the plaintiff's counsel, that there is an express provision that the landlord may re-enter.

If the defendants should accept the assignment without the written consent of the landlord, and pay the amount agreed upon, they would hold simply at the landlord's pleasure. It is in evidence that the landlord, an heir who has succeeded to the estate since that lease was granted, has declared to one of the defendants that he would not give his consent, saying that the plaintiff had no right to assign, and that if they, the defendants, took possession, he would put them out. This, in the event of an assignment, he could undoubtedly do, and if this court should compel the defendants to accept the assignment, and the landlord should put his threat into execution, the defendants would be wholly without remedy. The landlord could re-enter for condition broken, and a court of equity could not relieve the defendants against a forfeiture thus incurred (*Wafer v. Mocato*, 9 Mod. 112; Eq. Ca. Ab. 58; *Hill v. Barclay*, 18 Ves. jr. 63; *Gregory v. Wilson*, 9 Hare, 683; *Baxter v. Lansing*, 7 Paige, 352; *Davis v. West*, 12 Ves. jr. 475; *Rolfe v. Harris*, reported in *Bracebridge v. Buckley*, 2 Price R. 200; *Skinner v. Dayton*, 2 Johns. C. R. 535; Platt on Covenants, 423, 429; Story's Equity Jur. § 1324). A court of equity will relieve against forfeiture incurred by accident or mistake, or where full compensation can be made, as for non-payment of rent, or where there is some rule by which to measure the damages, or where an assignment is made by executors after death of lessee, without the lessor's consent, for there it is an alienation by the act of God (*Seers v. Hind*, 1 Ves. jr. 295), but not where the assignment is voluntarily made by the lessee without the lessor's consent. This was held in *Wafer v. Mocato* (*supra*), by Lord Macclesfield more than a century ago, and has been uniformly adhered to since. The reason is that the court cannot estimate the damage. There is no rule to go by, for it cannot say whether the lessor will gain or lose by the assignment. It is sufficient that he insists upon his covenant, and no one has a right to put him in a different situation. The law ascertains the contract, defines the rights of the contracting parties, and a court of equity will not interfere (Platt on Covenants, 429, 430).

This action is brought to compel the defendants to accept the assignment, irrespective of the landlord's consent, or for damages equivalent to the amount which the defendants agreed to pay for the assignment. No court of equity would compel the defendants to take a leasehold estate, pay the consideration therefor, when, by the very act of assignment, the landlord would have the right to re-enter and deprive them of the estate.

This may be a hard case for the plaintiff, who appears to have acted throughout in good faith, and has sold out his stock of goods at great loss and sacrifice, and closed up his business, that he might be enabled to deliver up to the defendants the possession of the store at the time agreed upon. He did nothing to mislead the defendants, or to draw them into the contract by any act or countenance. He submitted his lease for their examination, and requested them to read it over. They had it in their possession for more than an hour, and when they intimated their readiness to enter into the agreement, he suggested that they were rather quick; that they had better take time, and that he would give them the refusal. On their part, they testified that they read the lease only in part; that they read it only to the extent of seeing what restrictions were in it, and did not see the provision against alienation, which was in the printed part of the instrument. The agreement signed was that they would take the lease subject to the restrictions contained in it. There were many restrictions, chiefly declaratory of purposes for which the premises should not be used, and it was to these restrictions that the defendants gave their attention. They were not aware of this condition requiring the landlord's consent to the assignment, and if they had been, it would have made no difference, for they would then have had the right to assume that the plaintiff had, or could obtain, the landlord's consent. The plaintiff admits that he knew there was such a provision. He consequently knew that he had no absolute right to assign it without the landlord's consent, or if he did, that a forfeiture of the term would be incurred. This was a very grave matter. Did he expect that the defendants were to obtain the landlord's consent, or that they were to take the lease subject to the risk of being

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deprived of it by the landlord? He said nothing to them on the subject, nor they to him, for, as they testify, they did not know what he did—that there was a provision in the lease. The plaintiff agreed to assign the lease subject to the restrictions contained in it, and the defendants agreed to take it upon these terms, and pay a very considerable sum of money for it. Did this embrace the restriction that it was not to be assigned without the landlord's consent, except at the risk of the forfeiture of the lease? I think not. All the other restrictions were consistent with the enjoyment of the estate by the defendants for the remainder of the term, and depended for their fulfillment, after the assignment, exclusively upon their acts. But this did not. This restriction was violated by the very act of assignment itself. It was not, consequently, in the power of the defendants to observe and keep it. It was no longer a restriction except in the consequence that followed its violation, and over these the defendants had no power or control. They could not, therefore, be said to take the estate subject to a restriction, which would be broken by the very act which vested the estate in them. Even if they had known, or were, under the circumstances, chargeable with a knowledge of this provision, it would not follow that they had agreed to take the assignment at the risk of being divested of the estate, or upon the condition that they were to obtain, or take the risk of obtaining, the landlord's consent. The more reasonable interpretation is that it is an act essential to the assignment. That it is necessary to a full and complete transfer of the residue of the term, which, without it, would be of uncertain duration, and that, consequently, it is not for the one who is to receive, but for the one who is to make, the assignment, to obtain and possess all that is requisite to enable him to do it.

It is urged, in conclusion, that the acts of the defendants, after they knew of the existence of this covenant against alienation, amounted to a waiver of that objection within the meaning of a rule which has frequently been enforced in courts of equity. In certain cases, courts of equity have held that a party shall not discharge himself from the performance of a contract by falling back upon an objection when his acts, after

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he had full knowledge of the objection, show that he attached no importance to it, but acted in full recognition of his obligations under the contract, so as to indicate clearly that he had waived the objection. Thus, in *Fordyce v. Ford* (4 Brown C. C. 494), the premises were sold at auction as a freehold estate into a leasehold adjoining, without its appearing how much of the estate was freehold and how much leasehold. Upon investigation it appeared that of the seventy acres sold, sixty-two were leasehold and only eight freehold, but the defendant upon being advised of the fact made no objection upon that ground, but suffered the general investigation as to the title to go on, the deeds to be made out and delivered, involving a considerable lapse of time and then he refused to perform. The court held that, under such circumstances, he had waived the objection, and could not, upon the ground of the objection, be released from the performance of the contract; and in *Burnell v. Brown* (1 Jac. & Walk. 168), the purchaser of an estate, after he knew of the reservation of a right of shooting, hunting, and trouting upon the estate, which had not been mentioned at the auction sale, was, at his own request, let into the possession, and it was held that he had waived this objection and could not afterward fall back upon it to discharge himself from the contract.

In the present case, the defendants testify that they knew nothing of this covenant against alienation, and of the necessity of obtaining the landlord's consent, until the lawyer informed them of it. When applied to to complete the contract, they objected, and said they wanted to see the lawyer, and suggested that the plaintiff and his counsel should see their lawyer. They accordingly did see the defendants' lawyer, who said he wanted time to investigate, and they gave him a few days, the plaintiff's counsel taking the ground that there was no clause in the lease which prevented the plaintiff from disposing of it. It appears that the defendants went to the owner to get an extension of the lease which he refused to give. They said that they had purchased the lease of the plaintiff, and asked if he had the right to assign it, and the owner said no, and that if they took possession, he would put them out. They told the plaintiff that

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they were ready to complete the contract on their part but that the landlord refused to consent to the assignment. It also appeared that they put up bills upon the store to rent, and seem to have been in doubt as to what they were to do, and considerable delay occurred in which several interviews were had with the owner, who came to the store with some of the defendants and said to the plaintiff, "We object." On or before the 19th of February some of the defendants called upon the plaintiff, and said, "we suppose you know that the bank is not going to take the store." The plaintiff said he had heard something of the kind, and asked if they had seen the landlord, and if he would give them the extension, and one of them said no, and applied to the owner some derogatory term, but said they were going to carry out their contract, and spoke about letting the store, and asked what they ought to get for it. The plaintiff told them \$5,000 a year, and they put up bills to let. After that, the plaintiff had another interview with them about the 20th of February, and they wanted to make terms as to the time of payment, saying that they had been purchasing real estate and were short. One of the defendants testifies that they found out about the *last* day of February, that the plaintiff had no right to assign without the owner's consent, and, so far as I can gather from the evidence, it was at this time or after it that they interposed an objection upon the ground that the tender of the assignment was made, when they objected to take it, referring to their lawyer, and when they advised the plaintiff that the owner would not consent. This was nearly a month after their first interview with the plaintiff. Having interposed this objection about the time when, according to the testimony of one of them, they first learned of this difficulty, they must have done some act afterward clearly indicating an intention to accept the assignment without the owner's consent, and to waive the objection which they had previously interposed, and there is nothing in the evidence that would warrant me in finding that as a matter of fact.

This embraces a review of all the points reserved, and upon the grounds stated judgment must be given for the defendants.

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SUPPLEMENTARY PROCEED-
INGS, 2.

AMENDMENTS.

1. If a defendant has, from a misconception of his rights, want of knowledge, or other excusable cause, omitted to avail himself of a defense, it is always in furtherance of justice to permit him to set it up upon proper terms, if the application is made in good faith, and the allowing of it will work no injustice to the plaintiff. *Bowman v. DePeyster*, 208
2. Where the proposed new defense appears available, and its introduction imposes no hardship upon the plaintiff, nor involves an abandonment of the old defense, but, on the contrary, is consistent with, and, in fact, grows out of, such defense, calling simply for proof, on the part of the defendant, of record proceedings which plaintiff cannot deny: *Held*, that such amendment was properly allowed, even upon the trial. *ib.*

See APPEAL, 3.

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ANIMALS.

1. The owner of a domestic animal, who knows its vicious propensity, is liable in damages for injuries committed by it in the indulgence of its evil disposition. *Koney v. Ward*, 295
2. The defendant's horse was standing upon the sidewalk, hitched to a wagon, and the plaintiff, who was passing, although aware of the vicious propensity of the defendant's horse, yet knowing he was usually muzzled, stepped from the sidewalk into the street, and endeavored to pass in front of the animal, without observing that he was not then muzzled, and was bitten by him: *Held*, that it was not such contributory negligence as would prevent a recovery for the injuries received. *ib.*

APPEAL.

1. The finding of a referee upon a question of fraudulent intent is not conclusive or final, but may be reviewed on appeal. *Ruhl v. Phillips*, 45

2. Where, in an action for negligence, the justice before whom the cause was tried did not pass upon the question whether the plaintiff was guilty of contributing to the injury by his own fault, but dismissed the complaint upon the sole ground that the defendant was not liable as matter of law, the court will not, upon appeal, inquire whether or not the plaintiff was guilty of negligence, for the purpose of affirming the judgment. *Kimmell v. Burfeind*, 155

3. An order, allowing a defendant to amend his answer by setting up an additional defense, does not affect any substantial right of the plaintiff, within the meaning of subd. 3, of sec. 349, of the Code of Procedure, and is not, therefore, appealable (overruling *Harrington v. Slade*, 22 Barb. 161; and *Sheldon v. Adams*, 27 How. Pr. 179). *Bowman v. DePeyster*, 208

4. Where an action involves the examination of an account between the parties, it is, in its nature, referable, depending upon the fact whether it is, or is not, a long one; and with the conclusion of the judge granting the order upon such a point, an appellate tribunal will not interfere, unless the judge certifies that the point is one of sufficient importance or doubt to warrant a review. *Turner v. Taylor*, 278

5. An order granting a reference in a case where it is doubtful whether the examination of an account was at all so directly involved as to make a reference compulsory, may be reviewed on appeal. *ib.*

6. When a question has been fully considered, and deliberately determined, and there is a conflict in other cases upon the same point, the decision should be adhered to in the court in which judgment was pronounced, until disturbed upon adjudication of the court of last resort. *Greenbaum v. Stein*, 223

See COMMON CARRIER, 2.
DISTRICT COURT PRACTICE,
13, 14.

ARBITRATION.

1. The "misconduct" and "misbehavior" which, under the statute (2 Rev. Stat. 542, § 10), are grounds for vacating an award of arbitrators, must be acts which evince unfairness, or a violation of all the principles of a just proceeding, and not merely error of judgment, however great. *Turnbull v. Martin*. 428

2. The mere admission in evidence, by arbitrators, of *ex parte* affidavits in behalf of one party, and their refusal to permit one party to inspect the books of the other party, in respect to which testimony was being given, are not grounds for vacating their award, in the absence of evidence of fraud, corruption, partiality, or unfairness. *ib.*

3. Arbitrators are bound by no technical legal rules. They have a right to proceed informally, and in such a manner as, without violating those self-evident and fundamental principles upon which every fair investigation must be conducted, best tends to enlighten

their judgment, and enables them in their own way to arrive at the truth and merits of the controversy. *ib.*

ARREST.

1. An order of arrest for fraud in contracting the debt, under section 179, subd. 4, of the Code, may be granted in an action upon a judgment recovered upon the debt. *So held*, in an action upon a foreign judgment. *Greenbaum v. Stein*, 223

2. The amendment of 1864, of section 34 of the Metropolitan Police Act (Laws of 1864, ch. 403), which provides that no person holding office under that act shall be liable to military or jury duty, or to arrest on civil process, nor to service of subpoena from civil courts while actually on duty, does not have the effect of exempting a police officer from arrest in a civil action whilst not actually on duty. The words of limitation, "whilst actually on duty," applies to the whole preceding sentence, and not merely to the last predicate. *Coxson v. Doland*, 66

3. The privilege from arrest, whether derived from the common law, or extended by statutory enactments, has proceeded upon the ground that the public interests would suffer if those entrusted with the discharge of public duties could be arrested on civil process while engaged in the performance of them, and this exemption has always been regarded as subsisting only while such person, in the view of the law, may be supposed to be

engaged in the performance of his duties. Hence an intent on the part of the legislature to grant certain public officers absolute immunity from arrest on civil process will not be inferred, but must be distinctly expressed. *ib.*

4. To authorize an order of arrest, under subdivision three of section 179 of the Code of Procedure, on the ground that the property replevined has been concealed, removed, &c., by the defendant, it must not only appear that the property has been concealed, removed, or disposed of, but that such concealment, removal, or disposal was made with the intent that the property should not be found or taken by the sheriff, or with the intent to deprive the plaintiff of it. *Watson v. McGuire*, 219

See FALSE IMPRISONMENT, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A copartnership agreement provided that either partner might dissolve and close up the copartnership, upon the failure of the other partner to contribute his proportion of the capital. *Held*, that this clause, in the event of such failure, conferred sufficient authority upon the first partner to execute a general assignment of the firm's property, for the benefit of creditors, especially where there is evidence that the delinquent partner knew of, and consented to, the assignment. *Roberts v. Shepard*, 110

2. A partner who absconds, under

circumstances indicating an intention on his part to abandon the business and leave its control and management to the remaining partners, will be deemed to have consented to an assignment of the firm assets, by his partners for the benefit of the firm creditors; and an assignment so made will be upheld as against judgment creditors of the firm. *National Bank of Baltimore v. Sackett*, 395

See FRAUDULENT ASSIGNMENTS.
INSOLVENT DEBTOR.

ATTACHMENT.

1. To warrant the issuing of an attachment out of a district court, it is not sufficient that the statements of the affidavit, upon which the attachment is asked, are made on information derived from a person not named, and not under oath, without any explanation of the reason why the affidavit of such person is not procured, or more reliable testimony obtained. *Greene v. Gonzalez*, 412
2. Information derived from third parties may be sufficient, where the source and nature of the information are set forth with such particularity and certainty that the defendants can easily contradict it if it is untrue, and the plaintiff's inability to procure their affidavits is shown. *Id.*

ATTORNEY AND CLIENT.

1. A judgment debtor, who, in good faith, and with no intention to defraud the plaintiff's attorney of his costs, settles the judgment, is

entitled to have the judgment satisfied of record, notwithstanding the judgment creditor may not have paid his attorney's costs. *Pearl v. Robitschek*, 188

2. Where an action for the dissolution of a copartnership and an accounting is brought, and the parties settle the suit without the knowledge of the plaintiff's attorney, the court will not order the appointment of a receiver of the partnership property to secure the lien of the plaintiff's attorney. *Anonymous*, 583

3. All that the court will do, in such a case, for the protection of the attorney's lien, will be to allow him to proceed in the suit and enter up judgment for the amount of his costs. *Id.*

B.

BAILMENT.

1. A depositor with a savings bank is charged with notice of a regulation of the bank, which is printed in his pass-book, given to him at the time of the deposit, that "payments to persons producing the pass-book shall be valid payments to discharge the bank;" and he is bound promptly to notify the bank of the loss of his pass-book. A payment to a person producing a depositor's pass-book, and an order with his forged signature, two days after the loss of the pass-book by the depositor, without notice to the bank of the loss: *Held*, to exonerate the bank from liability, the depositor having been negligent in delaying to

give notice of his loss. *Kelly v. Emigrant Industrial Savings Bank*, 227

2. *It seems* that a by-law of a savings bank, which declares that payments of deposits to any person producing the depositor's pass-book shall be valid payments to discharge the bank, is void, as not being within its charter power to prescribe regulations for the return of deposits. (Per CARDOZO, J.) *ib.*

See COMMON CARRIER, 18.
INNKEEPER, 1, 2, 8.

BANKS.

See BILLS, NOTES, and CHECKS, 1, 2.
SAVINGS BANKS.

BILLS, NOTES, AND CHECKS.

1. The drawee of a check is presumed to know the handwriting of the drawer, and the genuineness of the signature to the paper, and, having paid the same, cannot recover back the money from the payee, although it afterward appears that the name of the drawer was forged. *National Bank of Commonwealth v. Grocers' Nat. Bank*, 289
2. The plaintiff's bank, in the regular course of its business, received from one of its depositors a check drawn upon the defendant's bank, and passed the same through the bank clearing-house, where it was debited to the defendant, and credited to the plaintiff. The defendant afterward finding that the drawer's signature was a forgery, returned the check to the clearing-house, contrary to its rules, where

it was credited to the defendant and debited to the plaintiff, who paid it. *Held*, That the payment of the check by the plaintiff was not voluntary, and did not prevent a recovery of the amount from the defendant. *ib.*

See EVIDENCE 4, 5.

BILLS OF LADING.

See COMMON CARRIER, 15.

BROKER.

1. Where a broker, under an employment to effect a sale of goods "to arrive," effects such a contingent sale, he is entitled to compensation for such service, notwithstanding the goods may never have arrived, and the sale never have been consummated. *Paulsen v. Dallett*, 40
2. A broker who performs services for another under a contract of employment, is entitled to recover compensation therefor, without proving any custom entitling him to a brokerage for like services. *ib.*
3. The plaintiff, a broker, was employed by the defendant to effect a sale of land, and to that end the plaintiff introduced to the defendant one R., who proposed to take the land in part payment of other land he wished to sell. The offer was rejected, but nearly two years afterward, the defendant sold the land to R.'s wife, through R.'s agency: *Held*, that the plaintiff was not entitled to recover broker's commission for effecting such sale. *Harris v. Burnett*, 189

4. A broker, employed to effect the sale of land, who makes an agreement with a purchaser, introduced by him, that in case of the latter's offer of an exchange being accepted, he, the broker, shall be paid a gratuity, cannot recover a broker's commission from his first employer in case the offer of exchange is accepted. (Per BRADY, J.) *ib.*

C.

CITY JUDGE OF NEW YORK.

It seems that the City Judge of the city of New York has jurisdiction of summary proceedings. Marry v. James, 437

COMMON CARRIER.

1. The responsibility of a common carrier continues in full force until notice of the arrival of the goods is given to the consignee, and a reasonable opportunity is afforded to remove them. *Solomon v. Philadelphia, &c. Express Co.,* 104
2. What is a reasonable time for a consignee to send for goods after notice of their arrival, is a question of fact. And the court having found, as a matter of fact, that notice was received Saturday morning, and that the next Monday morning was a reasonable time for the consignee to send for the goods—*Held*, that such finding will not be disturbed on appeal. *ib.*
3. One who sends a notice through the mail, instead of by a messenger, must bear the consequences of any delay in the receipt of the notice by the party to whom it is directed, not occasioned by such party himself. Any inference as to the day when a notice sent by mail was delivered, which may be drawn from the fact that it was mailed on a particular day, is overborne by evidence of its receipt upon a different day. *ib.*
4. The obligation of a common carrier to notify the consignee of the arrival of goods, and of the place of their deposit, and to safely store them after arrival if the owner cannot be found, can be varied only by an express contract or by a uniform and well-known usage establishing a mode of delivery in certain cases, or at particular places, in conformity with which the parties may be presumed to have contracted. *Browning v. The Long Island R. R. Company,* 117
5. On the trial of an action against a railroad company for the loss of goods transported by it, it appeared that the servants of the company had placed the goods upon an open and exposed platform at the place of destination, from which they were stolen, no notice of their arrival having been given to the consignee. The defendant offered to show that, by a well-known and long established custom of the company, goods were deemed delivered when safely deposited at the platform of the station; and were considered, by the custom and printed rules of the company, to be thereafter at the risk of the owner. *Held*, that the offer was properly refused, on the ground that if such a custom was admissible, it would not have been

available, as the goods in this case were not "safely deposited" at the platform, without which no foundation was laid for the proof. *Held further*, that it was proper to exclude an offer to show that where freight was required to be paid for in advance, as in this case, it was the well-known and long established usage for the shipper to notify the consignee of the shipment of the goods, and for the consignee to come for his goods without notice of their arrival by the company; for if such a custom prevailed, it would not excuse the defendant for the want of proper care until the consignee could come and get his goods; nor could such evidence be material in any case, it seems, unless the defendant could show that it was through the shipper's negligence in not giving notice, or through that of the consignee in not acting upon it, that the property was lost or injured.

ib.

6. A regulation or usage of a railroad company requiring all claims against it for damages, by reason of loss or injury to goods transported by it, to be made within ten days after the delivery at the station,—*Held*, unreasonable; and that an offer to prove it was properly rejected. *ib.*

7. It is negligence in a ferry proprietor not to provide a ferry-bridge which can be raised and lowered with the tide, so as to be brought to a level with the boat while discharging its passengers; and it is negligence in a ferry proprietor to order vehicles to be driven off the boat while it is at an unsafe distance

above or below the level of the bridge. *Haeman v. Hoboken Land &c. Co.*, 180

8. Some time after the defendants' ferry-boat arrived at the ferry-house, and was fastened to the bridge, and while the arriving passengers were coming off the boat, the plaintiff, in making his way to the cabin of the boat, became wedged in the press of the on and off-going passengers near the string piece which separated the passenger-way from the carriage-way of the boat. While in this position, he placed one foot over the string piece into the carriage-way, and at that moment defendants' servant lowered the chain in front of the carriage-way, and ordered the carts, &c., to be driven off. The bridge being eight or nine inches higher than the boat, one of the horses, in attempting to mount the step thus formed, fell upon the plaintiff, and crushed his leg. *Held*, that there was sufficient proof of negligence on the part of the defendants to go to the jury, and it was error not to submit the question of defendants' negligence to the jury. *ib.*

9. Where the plaintiff, a passenger on the defendants' ferry-boat, was crowded out of the passenger-way into the carriage-way of the boat, and it appears that the crowding and pushing of the passengers could have been prevented by the erection of a permanent division on the ferry-bridge, restraining passengers from going to the boat until it was discharged of its arriving passengers, and by the erection of an effective barrier between the car-

riage-way and passenger-way of the boat, the court will not say, as matter of law, that it was negligence on the part of the plaintiff to be in the carriage-way when injured.

ib.

10. The delivery of a written receipt for goods by a common carrier is, *prima facie*, evidence that the goods were received by him; and his failure either to deliver, or to account for, the goods, is presumptive, in the absence of evidence to the contrary, that they were lost through his negligence. *Earle v. Cadmus*, 237

11. A condition contained in a common carrier's receipt of a trunk, provided that he would not be liable for "an amount exceeding \$50 upon any article." *Held*, that the condition, conceding it to be valid, referred to the separate articles contained in the trunk; and their separate value not exceeding that sum, a recovery might be had for their aggregate value, although the amount exceeds \$50.

12. The fact that a passenger by the defendants' steamboat, at the time of paying for his passage and a state-room, wore his overcoat (which he afterward deposited in his state-room, whence it was stolen, without fault on his part), cannot be regarded as indicating an *animus custodiendi* on his part, to the exclusion of the carrier, so as to relieve the latter from liability for the loss. *Gore v. Norwich & N. Y. Trans. Co.*, 254

13. The granting, for compensation, of the use of a state-room, in the absence of notice to the contrary,

is a designation of the place in which the passenger may place his ordinary baggage, but not to the exclusion of the carrier, inasmuch as the whole vessel is in the possession and under the control of the carrier, and the *animus custodiendi* of the passenger, as to wearing apparel in temporary use, ceases when the article is placed in the state-room. *ib.*

14. The proprietor of a steamboat is liable for wearing apparel stolen from a passenger's state-room, in the absence of negligence on the part of the latter. *ib.*

15. The defendants' steamboat was moored to a pier upon which was their railroad depot, containing a large quantity of combustible materials, and the roof of which was coated with tar. The plaintiff's goods, which had been unshipped from the boat, were deposited on the defendants' pier, and during the night, a fire, the immediate cause of which was not proved, broke out upon the steamboat, and in a very short time, the boat and depot were in flames, and the plaintiff's goods, with the other contents of the depot, were burned up. Four watchmen were on duty upon the pier at the time, but there was no watchman upon the steamboat. The bills of lading issued by the defendants to the plaintiff contained a stipulation exempting the defendants from liability for loss or injury to the goods by fire,—*Held*, that the stipulation in the bill of lading, exonerating the defendants from liability for the loss of the goods by fire, did not operate to divest

them of their public character as common carriers, but merely to exempt them from liability in such a case, where there was no fault or negligence on their part.
Lamb v. Camden & Amboy R. R. Co. 456

16. Hence it was not enough for the defendants to show that the plaintiff's goods were destroyed by fire, but the burden of proof was on them to show that their destruction by that element was without any fault on their part, and that they exercised all the care and diligence for the safety of the goods which could be reasonably expected under the circumstances. *ib.*

17. *Held*, that it was not error to charge the jury that if the defendants omitted to take that degree of care which persons of ordinary prudence usually take of such property under such circumstances, they were liable. Nor was it error to instruct the jury that the omission of the defendants to place a watchman actually on the boat, charged with the duty of guarding her, might be considered by them, on the question of negligence, as this was no more than telling them to determine the question upon all the circumstances of the case. *ib.*

18. As a general rule, where the liability of a bailee turns upon the point whether the loss of, or injury to, the property in his custody was owing to the want of ordinary care and diligence on his part, it should, even where there is no conflict as to the facts, be left to the jury to determine, under

proper instructions; and their verdict should be regarded as decisive and final upon such a question, unless the case is one warranting the conclusion that they must have been influenced in their verdict by other motives than the consideration of the circumstances arising upon the evidence. *ib.*

19. *Held further*, that it was not error for the court to refuse to charge the jury that the loss must have arisen *solely* from the defendants' negligence. If the negligent act or omission of the defendants contributed to the loss, it is not for the court or for the jury to measure in what proportion or degree, if the act or omission was in itself a want of ordinary care and diligence, unless the loss or injury *must* have happened, notwithstanding the act or omission complained of. *ib.*

20. The liability of a common carrier continues for a reasonable length of time within which the plaintiff may take his goods away; and what is a reasonable length of time, under the circumstances, is a question for the jury, even where there is no conflict of testimony. This rule is not affected by the provision of the bill of lading, that the goods were to be delivered at the carrier's depot. *ib.*

21. *It seems* that where the goods were lost after their arrival at the place of destination by the carrier's want of ordinary care, it is immaterial whether a reasonable time had elapsed within which the owner might have taken them away. *ib.*

22. An action against a common carrier for the loss of goods undertaken to be carried by him, may be founded upon the contract for carriage, or upon the breach of his duty as a carrier; and where negligence is averred and proved, if the complaint is defective in setting up also a contract, the court may, after verdict, amend the complaint so as to conform the pleading to the proof. *ib.*
23. An intermediate carrier is entitled to the benefit of any agreement entered into by the owner of the goods carried with the first carrier, qualifying or limiting the the common-law responsibility, and will be regarded as taking the goods for carriage upon the same conditions and subject to the limitations or exceptions that exist in that agreement. But the mere delivery by such intermediate carrier to the carrier from whom he received the goods, of a receipt containing a condition that the value of the property at the place of shipment shall govern in the event of loss, is not a contract made with the owner, and does not change the common-law rule as to the measure of damages in an action against the in intermediate carrier for loss of the goods on his route. *ib.*

CONSPIRACY.

1. The by-laws or pledge of an incorporated association of master workmen, subscribed by the defendant, provided that any member of the association found guilty by its committee of working for less prices than those fixed by the

association, should forfeit to it twenty-five per cent. of the price fixed for the same work, the penalty to be collected in the name of the association by process of law: *Held*, on demurrer to the complaint, in an action by the association to collect such a penalty, (1.) That such an association was not an unlawful combination to commit any act injurious to trade or commerce within the meaning of 1 Rev. Stat. 691, §§ 8, 9. (2.) That such a by-law or pledge was not unlawful as made in restraint of trade. (3.) That the by-law, being one which the association had the power to make, the association had also the power to attach to its violation a penalty, and an action might be maintained for its recovery. *Master Stevedores' Association v. Walsh*, 1

2. *Held further*, that the word "forfeit," as used in the by-laws was not equivalent to a *forfeiture*, but meant a mere pecuniary penalty. *ib.*

3. That it is not unlawful for any number of journeymen or master workmen to agree on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices; but any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation, or agreement fixing the rate of wages to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs journeymen below certain rates, unless the journeyman pays

the penalty imposed by the combination, or by menaces, threats, intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into it may be indicted. The grounds on which *People v. Fisher*, 14 Wend. 9, was decided, reviewed, and the rules governing trade-unions stated. *ib.*

CONTEMPT.

1. Where a person who is ordered to show cause why he should not be punished for a contempt in not obeying an order theretofore served on him, insultingly refuses to receive the order to show cause, or a copy of the order disobeyed, and directs the person presenting the papers to serve them upon his attorney: *Held*, sufficient proof of a demand and refusal to authorize the issuing of an attachment. *Graham v. Bleakie*, 55
2. Upon *habeas corpus*, in a case of a commitment for a contempt, the judge is limited to the inquiry, (1.) is the contempt specially and plainly charged in the commitment; and (2.) had the officer authority to commit for the contempt charged. If these appear, the prisoner must be remanded. *Matter of Percy*, 530
3. An order made by the court is a sufficient commitment, where the contempt has been committed in the presence of the court. *ib.*
4. Whether the order should not direct the sheriff to take the prisoner into his custody and confine him, —query? *ib.*

5. Although the commitment is defective, yet, where it appeared upon the hearing that the prisoner was guilty of a criminal offense, the proper course is for the judge to discharge him formally from the imprisonment and recommit him, or, in this State, as provided by statute, to remand him. *ib.*

6. A commitment for a contempt committed in the presence of the court is an adjudication of an action for a criminal offense, and is, therefore, not bailable. *ib.*

See FORECLOSURE, 1.

CONVERSION.

1. A purchaser in good faith, for a valuable consideration of government securities, transferable by delivery, acquires a title valid against the world, and to constitute want of good faith there must be knowledge of the want of title in the seller, or the means of knowledge, to which the purchaser willfully shut his eyes (following *Murray Lardner*, 2 Wallace, 110). *Seybell v. National Currency Bank*, 883
2. It will not suffice that there was on the part of the purchaser a want of care and caution, or gross negligence, or a knowledge of circumstances which would excite suspicion in the mind of a prudent man, the rule in respect to *mala fides* being a question of honesty or dishonesty, of the existence of guilty knowledge, or of that willful ignorance which is equivalent to it. *ib.*
3. Where the only evidence of *mala*

fidem on the part of the purchaser (a bank) of stolen government bonds, was that a printed description of the bonds and a notice of their loss by robbery had been left at the bank the day after the loss, it not appearing that such notice was ever seen by the officers of the bank, and also that it was the avowed rule of the bank to disregard such notices.—*Held*, in an action against the bank by the owner of the stolen bonds for their conversion, that it was error to charge the jury that "if the defendants either had, or with reasonable care and attention might have had, notice of the loss, the plaintiff was entitled to recover," as this was in effect holding that a purchaser of a negotiable government bond, in the usual course of business, for value, acquired no title, if he might, by the exercise of reasonable care and attention, have ascertained that it had been stolen. *ib.*

4. The custom of the defendants to disregard printed notices of lost and stolen bonds was properly submitted to the jury as evidence from which bad faith might be inferred; but the defendants should have been permitted to show, from the magnitude of their dealings in such securities, and the amount in circulation, and the amount of them lost and stolen, that it was impracticable to keep a record of, or to regard, such notices. *ib.*

CORPORATIONS.

1. As the privilege of membership of a voluntary unincorporated as-

sociation, is not conferred by the sovereign power, but is created solely by the organization itself, courts of law cannot compel the admission of an applicant for membership, nor interfere to restore to membership one who has been expelled for non-compliance with the conditions upon which membership is made to depend. *White v. Brownell*, 329

2. The members of such an association are bound by its rules, when not in conflict with the law of the land; and the courts can interfere no further than to hold the association to a fair and honest administration of those rules. Therefore, to warrant the granting of an injunction to restrain the officers of a voluntary unincorporated association from carrying into effect a resolution or vote suspending a member from the privileges of the association, it must appear that the suspension was in violation of the constitution, rules, or by-laws; for, unless they were violated by the proceedings against him, he could have no ground of complaint. *ib.*
8. The "Open Board of Brokers," in the city of New York, is not a copartnership within the operation of the equitable remedies afforded by the courts for the protection of the rights of partners, as between themselves. Nor is that board a corporation in such sense as to render it subject to the rules by which courts of equity interfere to restore a corporator, who has been unlawfully expelled or disfranchised, to his privilege of membership. *ib.*

See DISTRICT COURT PRACTICE, 9.
 MASTER AND SERVANT, 8.
 MONEY HAD AND RECEIVED, 1.
 MUNICIPAL CORPORATIONS.

COSTS.

1. The several defendants separately appeared by different attorneys interposing answers setting up substantially the same defense, and on a judgment dismissing the complaint, separate bills of costs were taxed, and, on appeal from the judgment, the appeal was affirmed on one argument,—*Held*, That only one bill of costs of the appeal should be taxed. *Delamater v. Carman*. 182

See ATTORNEY AND CLIENT.

COURT OF COMMON PLEAS.

The court of common pleas has the same powers as those exercised by the late court of chancery, and by the present supreme court, in all actions where the defendant resides, or is personally served with process, in the city of New York. *Christy v. Libby*, 418

D.

DAMAGES.

1. The bodily pain or suffering, which constitutes an element in estimating damages for bodily injuries, is not confined to that which may have been incurred before the trial, but includes such future suffering as it is reasonably certain from the evidence must result from the injury. *Aaron v. Second Avenue R. Co.*, 127

2. The loss of the profits of a business which is the proximate consequence of the defendant's negligence, is allowable in estimating the damages. Hence, where the plaintiff's business, as an expressman, was wholly suspended by reason of a fatal injury to his horse, caused by the defendant's negligence, he is entitled to a reasonable time in which to select another horse, and the loss of his profits during that time are allowable as damages. And what is a reasonable time in such a case, is a question for the jury. *Albert v. Bleeker Street &c. R. R. Co.*, 889

See COMMON CARRIER, 21.

DEATH.

1. Although the law presumes that one who is missing is living, until seven years have elapsed, yet circumstances may be shown from which a jury will be warranted in assuming that he was dead at a time within that period. *Stouvenel v. Stephens*, 819
2. Hearsay evidence is only admissible to overrule the presumption of life, after a considerable lapse of time. *ib.*
3. Where there is evidence of a character, considered by itself, to create a reasonable probability that a party was dead on a certain day, and the evidence that he was seen afterward is contradictory: *Held*, that every thing, however slight, which tends to strengthen the former evidence—such as the habits of the party, &c.—should be received in evidence. *ib.*

DEBTOR AND CREDITOR.

Interest upon the separate writings of a mutual running account will be allowed only from the time of the liquidation of the amount, in the absence of proof as to when the account was rendered, or that the amounts of the items were specifically agreed on, or that there was some proof of a custom to charge interest. *Salter v. Parkhurst*, 240

DEFINITIONS.

The legal definitions of "inn," "hotel," and "boarding-house," compared. *Cromwell v. Stephens*, 15

See CONSPIRACY, 2.

INNKEEPER, 2.

HOTEL, 1, 2.

DISTRICT COURT PRACTICE.

1. The district courts of the city of New York have no jurisdiction of an action upon a bond conditioned other than for the payment of money, except surety bonds given under section 53, subd. 6 of the Code of Procedure. *So held*, in an action against a surety on a bond conditioned for the appearance of a judgment debtor attached for contempt. *Smith v. White*, 72
2. The district courts in the city of New York have no jurisdiction of an action brought to charge the separate estate of a married woman for a debt contracted by her with reference to such estate. *Salter v. Parkhurst*, 240
3. After the removal of a cause from a District Court to the Court of Common Pleas (pursuant to Laws

of 1857, ch. 344, § 3), the issues cannot be so changed that a subject not of original jurisdiction may be litigated against the consent of one of the parties. Hence it is error to allow the plaintiff, on the trial of a cause removed from a district court, to amend his complaint by changing the demand against the defendant to one incurred by her as a married woman, and as a charge upon her separate estate. *Id.*

4. There being no issue as to title to land under the pleadings, and the only evidence on the trial, as to title, being an admission of ownership by the defendant: *Held*, that no question of title was raised. *Eagle v. Swayze*, 140
5. The statute is imperative, that when it appears on the trial in a district court that the defendants are not residents of the city of New York, and that the plaintiffs are residents, but not of the district in which the action was brought, the complaint must be dismissed. And it does not alter the rule, that the objection of want of jurisdiction was not taken by answer, and only after the plaintiff had rested his case. *McKee v. Oliver*, 381
6. Where, in an action in a district court in the city of New York, a defendant presents an undertaking to the justice, pursuant to chap. 344, sec. 3, Laws of 1857, for the purpose of removing the cause to the court of common pleas, the jurisdiction of the justice in the cause, except to adjourn, is arrested, until he has dis-

- posed of the new element thus introduced. *Hogan v. Devlin*, 184
7. Where a justice, after the filing of such an undertaking, and before its approval or disapproval by him, entertained a motion by the plaintiff to reduce the amount of his claim, and thus, on the proof adduced, gave a judgment for the plaintiff: *Held*, That such judgment was erroneous, and will be reversed on appeal. *ib.*
 8. An action may be maintained, in a district court of the city of New York, against a corporation which has any place for the transaction of business in that city. It is not necessary that its general business should be transacted within the city; nor is it necessary that it should be sued in the district in which its general business is transacted. It may be sued in any district in which it has a place of business. *Jay v. Long Island R. R. Co.*, 401
 9. The provision of section 23 of the act of 1862 (Laws of 1862, 970), that "no person, who shall have a place of business in the city of New York, shall be deemed to be a non-resident," &c., includes corporations. Hence, a corporation, having any place of business in the city, must be sued by long summons. *ib.*
 10. An objection to jurisdiction, in a district court, must be taken at the trial, or it will be deemed to have been waived. *ib.*
 11. Although the Act of 1857 does not in terms require the justification of sureties to an undertaking required to remove a cause into the common pleas from a district court, the undertaking is nevertheless subject to the approval of the justice, who may adopt any reasonable mode of satisfying himself of the sufficiency of the sureties offered. *Moon v. Thompson*, 180
 12. Hence, where, in an action in a district court, the defendant submitted an undertaking to remove the cause into the court of common pleas, and the justice required the defendant to produce his sureties for justification, and on examination one of them was rejected, as being insufficient, and the cause was adjourned, to enable the defendant to produce the other surety: *Held*, that a judgment rendered for the plaintiff, on the adjourned day, on the failure of the defendant or his surety to appear, was regular, and would be affirmed on appeal. *ib.*
 13. The time within which an appeal may be taken from a district court judgment, begins to run from the time the judgment is actually entered, and not from the date of the decision upon which judgment was entered. *Fuchs v. Pohlman*, 210
 14. The service of a notice of appeal from such a judgment, made upon the respondent's attorney, instead of the respondent personally, is sufficient, if the latter cannot, after due diligence, be found. What will be deemed due diligence in such a case,—considered. *ib.*
- See ATTACHMENT, 1, 2.
EXECUTION.
MARINE COURT PRACTICE.

DOMICIL.

1. A foreigner continuously and exclusively employed in the vessel of a nation, may by length of time acquire a residence in that nation as effectually as though he had remained upon the land within its boundaries. Vessels are subject to the jurisdiction of the country to which they belong, and for certain purposes are regarded as part of its territory. *Matter of Bye*,

525

2. Every human being has a fixed domicile, which is the place where his parents lived at the time of his birth, and which continues until he acquires another, and the supposed exceptional cases of gypsies, vagrants, or wandering outcasts, who do not know where or when they were born, are not exceptions to the rule, for their place of birth, if known, is their domicile, and if not known, it is the place of which they have the earliest recollection, or beyond their recollection, where they were first known and seen by others. *ib.*

3. Residence is usually the result of a man's voluntary acts, and whether he has acquired one, in the sense of domicile, depends less upon general rules than upon the circumstances of his individual case. It is more a question of fact than of law. *ib.*

4. If it is usual with a mariner to ship in any vessel, indifferent as to the country to which she belongs, or as to the part of the world in which he may find himself when his contract ends, it will be in-

ferred that no intention existed to change his domicile, but to suffer that to continue which he acquired at his birth, or had when he first became a mariner; *otherwise*, when his acts clearly indicate an intention to make some particular place or country his residence, or when he confines himself in his calling for many years exclusively to the vessels of a particular nation, repeatedly declaring during that time his intention to continue in that country for the remainder of his life.

ib.

5. If a married man, his residence is the place or country where his wife or family dwell, but this is not conclusive in all cases. A man's wife cannot control his right to fix his permanent place of abode in any part of the world to which his interest or inclination may lead him. It is her duty to follow him, and abide in the place where it is most convenient for him to enjoy her society, and where he is willing to provide for her and his children. *ib.*

See NATURALIZATION.

E.

ESTOPPEL.

1. An act, admission, or representation will not operate as an estoppel *in pais*, unless it is made with the design to influence the conduct of the party who acts upon it. *Donaldson v. Hall*, 325
2. The mere rendition, by a surviving partner, of a copy of the firm's

books showing a credit to A. for the amount of which the firm had given to A. a non-negotiable due-bill, does not estop such surviving partner from denying the debt, in an action against him upon the due-bill, by an assignee of A.; it not appearing that such rendition was made with any intent to induce others to purchase the claim.

ib.

3. Otherwise, *it seems*, if the plaintiff, before purchasing the due-bill, had sought for information from the defendant, and the latter had given him a copy of the account, showing the credit. *ib.*

4. It is a general rule that the voluntary payment of a claim, with a full knowledge of all the facts, where there is neither duress, compulsion, nor fraud, is final, and the money cannot be recovered back on the ground that the party was under no legal obligation to pay it. *Meyer v. Clark*, 497

5. But this rule applies only where payment is made with a knowledge of, or with the means of ascertaining, all the facts, and under circumstances which must be regarded as equivalent to an acquiescence in the claim, and where the party receiving payment is entitled to treat it as received in the final settlement and discharge of the claim. *ib.*

6. Hence, where the buyer of a certain amount of gold coin claimed that only a portion of it had been delivered to him, and notified the seller that unless the residue was delivered, he would buy the coin elsewhere on the seller's account,

and the latter in order to prevent such a purchase on his account, delivered the residue claimed to be due, under protest, and expressly declaring that the delivery was made without a waiver of his rights: *Held*, that such subsequent delivery was not, by the intention of the parties, or necessarily by its operation or effect, a delivery under the contract of sale, and was not therefore conclusive upon the seller so as to prevent a recovery, in a proper action, of the amount so delivered.

ib.

EVIDENCE.

1. An objection, made at the trial, to the incompetency of a certified copy of a judgment as evidence of the judgment, is obviated, on appeal, by the production, on the argument, of a duly exemplified copy of such judgment. *Robert v. Donnell*, 64

2. The declaration or statement of an agent is received as evidence against the principal only where it constitutes part of the *res gesta* in some transaction where he acts for his principal, and where it is in the nature of original, and not hearsay, evidence. *Greene v. Gonzales*, 412

3. Whether the contents of a paper, though not the foundation of the action, but relating solely to a collateral fact, may be proved by parol—*query*. *Frank v. Manny*, 92

4. In the absence of an affidavit accompanying an answer by an indorser of a promissory note, show-

- ing want of notice of presentment and non-payment of the note, as provided by statute (Laws of 1888, chap. 271), the notarial certificate of presentment and non-payment of the note is *prima facie* evidence of the truth of its contents. *Dunn v. Deolin*, 122
5. Where it appears, by such certificate, that the notice of protest was given by depositing the same in the post-office, directed to the indorser at New York city (his residence), *Held*, that such presumption is not overcome by testimony of the notary, on the trial, that he might possibly have directed the notice to a particular street, in which defendant did not reside; and, therefore, it was not error to submit to the jury the question of the sufficiency of the notice. *ib.*
- See* COMMON CARRIER, 3, 5, 10, 16.
DAMAGES, 1, 2, 3.
FRAUDULENT ASSIGNMENTS, 6, 7.
- EXECUTORS AND ADMINISTRATORS.**
1. The provision of the Revised Statutes, conferring jurisdiction upon surrogates (2 R. S. 95, § 68), was intended to provide an inexpensive and summary mode for bringing executors, &c., to account, but did not take away the power theretofore exercised by courts of equity to afford this species of relief. They still exercise concurrent, and in some cases exclusive, jurisdiction. *Christy v. Libby*, 418
2. An action lies by an administrator against one who had been appointed collector of the estate of plaintiff's intestate by a surrogate, to compel him to account for assets in his hands. And in such an action it is not necessary to aver, in the complaint, an accounting before the surrogate; nor to allege facts from which the surrogate's jurisdiction to grant administration of the estate may be inferred. *ib.*
3. In such an action, the defense that proceedings are pending before the surrogate on defendant's accounting, can only be taken by answer. *ib.*
- EXECUTION.**
- Where a transcript of a judgment, recovered in a District Court of the city of New York, for over \$25.00, exclusive of costs, is docketed in the county clerk's office, the judgment creditor or his attorney, and not the county clerk, is the proper person to issue an execution upon the judgment (disapproving *Brush v. Lee*, 18 Abb. Pr. Rep. 398). *McDonald v. O'Flynn*, 42
- F.**
- FERRY COMPANY.**
- See* COMMON CARRIER, 7, 8, 9.
NEGLECT, 2.
- FALSE IMPRISONMENT.**
1. Words or acts of provocation, to have the effect of a breach of the peace, must tend *immediately* to

that effect. Hence it is not, as matter of law, a breach of the peace for one who, taking a meal at a restaurant, fraudulently substitutes the check given him there for one of less amount, which latter he pays. And where, under such circumstances, the keeper of the restaurant calls a police officer, and orders the arrest of such a person, *Held*, that he is liable in damages, although the facts will justify nominal damages only. *Boylston v. Kerr*, 220

2. In an action against the keeper of a saloon, for causing the plaintiff's arrest, on account of his having substituted and paid a check for a smaller amount than the one received for his dinner: *Held*, that the defendant was liable for damages. *ib.*
3. *Semble*, that if the magistrate had convicted the plaintiff, under the Laws of 1833, p. 11, § 8, of disorderly conduct, *in his opinion* tending to a breach of the peace, it might have been available as a defense. *ib.*

FORECLOSURE.

1. Where the title to land sold under a judgment of foreclosure is good, and the purchaser refuses to complete the purchase, a resale may be ordered, in which case the purchaser will be answerable for the deficiency; or the court may, if the purchaser is a responsible person, absolutely order him to complete the purchase, and, on his default, issue an attachment against him. The latter is the proper course where there is reason to believe that the purchaser

is acting in collusion with the mortgagor to frustrate the sale. *Graham v. Bleakie*, 55

2. Upon an order requiring a purchaser at a judicial sale to show cause why he should not complete the purchase, he may apply to the court for an order of reference to ascertain if a title can be made, and if it appears from the referee's report that the title is irretrievably bad or of doubtful validity, the court will not compel him to complete the purchase. *ib.*
3. The only estate of the mortgagor in the mortgaged premises was a leasehold interest, but the mortgage purported to convey the fee; and on a foreclosure of the mortgage, the judgment, following the terms of the mortgage, erroneously directed a sale of the premises as in fee. *Held*, that a purchaser at the sale under such decree, having full notice of the facts and of the leasehold title of the mortgagor, could not take advantage of the irregularity of the decree. Where the court has jurisdiction of the subject matter and of the parties, a sale under its judgment will transfer to the purchaser whatever title the mortgagor has in the premises, even though the judgment should afterward be reversed or set aside for error or irregularity. *ib.*
4. Where a defect in the title of a mortgagor, which is objected to by a purchaser on a foreclosure sale of the mortgaged premises, is offered, by the referee, to be effectually cured, by tendering to the purchaser a confirmatory deed by the mortgagor's grantor, such de-

fect of title, if cured, cannot be urged by the purchaser as a reason for not completing the purchase. *ib.*

FRAUDULENT ASSIGNMENT.

1. A sale of the entire effects of an insolvent copartnership, upon a credit of from twelve to twenty-four months, the necessary effect of which was to postpone the payment of the creditors until the expiration of the term of credit, as well as to make the ultimate discharge of the copartnership debts dependent upon the pecuniary ability of the purchaser to pay the notes given by him as they respectively fell due.—*held*, as having been made with the intent to hinder and delay creditors, and was therefore void. *Ruhl v. Phillips*, 45
2. The hypothecation of a part of the property of an insolvent firm to secure the payment of an individual debt of a partner,—*held*, under the circumstances sufficient to establish a fraudulent intent. *ib.*
3. It makes no difference whether the sale of the whole of the effects of an insolvent copartnership upon credit, or the application of partnership effects to the payment of the individual debt of a partner, is accomplished by the creation of a trust, or by a direct sale to a purchaser. The effect in both cases is the same, to hinder and delay creditors, and what would be fraudulent in one form is equally so in the other. *ib.*
4. A creditor who has obtained and levied an attachment upon a debtor's property, and afterward, upon a judgment recovered, has issued an execution, is entitled to the equitable intervention of the court to set aside a fraudulent transfer of the property upon which the attachment lien rests, or any fraudulent obstacle in the way of enforcing the lien, without waiting the return of the execution unsatisfied. *Heys v. Bolles*, 231
5. Where one partner of an insolvent firm purchased the interest of his copartner in the assets, and then made a general assignment, with a direction, first, to pay his individual debts: *Held*, That the assignment was void, as made in fraud of the creditors of the firm. *ib.*
6. A sale upon credit of part of their property by an insolvent firm is a circumstance which may be considered, with others, as bearing upon the question of a fraudulent intent, but alone does not necessarily establish it. And where it appears that the property was sold upon a usual credit, to a responsible person, for its reasonable value, and that the debts preferred by the assignment subsequently made were honestly owing, and nothing appears but that there was other property of the insolvents not covered by the sale, the court will not overrule the finding of the referee, that the sale and assignment had not been made with intent to hinder, delay, or defraud creditors. *Roberts v. Shepard*, 110
7. Fraudulent representations of solvency, by which one induces

credit to be given him just before making a general assignment, are evidence to indicate a general scheme of fraud, of which the assignment was a part. *Kennedy v. Thorp*, 258

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

INSOLVENT DEBTOR.
MECHANICS' LIEN, 8.

H.

HIGHWAYS.

1. A municipal corporation is liable to one who, without fault on his part, is injured by falling through a defective grating in a public sidewalk, where the defect has existed long enough to imply notice of its existence. *Reinhard v. Mayor &c. of New York*, 48
2. The liability of the corporation, in such a case, is not affected by the fact that if its ordinances had been complied with by the owner of the property fronting on the sidewalk, the injury would not have occurred, for it was the duty of the corporation to enforce its ordinances, and the public may rely upon such an enforcement, and not seek the persons who violate them. *ib.*

See NEW YORK CITY, 1.

HOTEL.

1. The plaintiff's building was a large structure, eight stories in height, those above the basement being exclusively used as lodgings for single persons at a fixed rate

per night. There were no arrangements for boarding or cooking for guests, nor was there any bar or restaurant belonging to or connected with the plaintiff's occupation of the building. The Croton water during half of the day did not usually rise above the basement of the building, owing to the deficiency of the supply, and was not supplied throughout the whole building. *Held*, That such a structure is not that kind of a house for the general reception of travelers which in this country is known as a "hotel," and is not, therefore, strictly within the ordinance fixing the water tax payable by "hotels." *Cromwell v. Stephens*, 15

2. Although the uses to which a building is applied may not, either in the legal or in the popular acceptance of the term, make it a *hotel*, it may still be deemed one in the sense of an ordinance regulating the rate to be paid for the supply of Croton water, if it is apparent that it is a kind of establishment for which the ordinance meant to provide. *ib.*
3. *It seems*, therefore, that a lodging house, freely supplied with water, would come within the intention of such an ordinance. *But held*, That the plaintiff's structure, not being thus supplied, it was not chargeable with the extra tax "as a hotel," for each lodging room. *ib.*

See INNKEEPER.

HUSBAND AND WIFE.

1. There is nothing growing out of the relation of husband and wife

which prohibits the latter acting as the agent of her husband.
Berwick v. Dusenbury, 107

2. Where a married woman, in the absence of her husband, and without any express authority, had hired apartments for a year from, and taken possession on, the 1st of May, and her husband, returning on the 6th, occupied the apartments with her up to the 23d or 24th day of that month, when they left,—*Held*, that the husband was liable for the rent, as having, by his delay in not repudiating the contract made by his wife, adopted and ratified it.
ib.

3. A gift from a husband to his wife,—*Held*, sufficiently proved.
Donaldson v. Hall, 325

See MARRIED WOMEN.
DOMICIL, 5.

I.

INJUNCTION.

1. An injunction will be granted to restrain the Croton Aqueduct Board of the City of New York from cutting off the Croton water from the plaintiff's building, on the ground of non-payment of the water rate, where the rate charged by them, and for non-payment of which they claim to stop the supply, is more than is authorized by law. *Cromwell v. Stephens*, 15
2. To justify a court of equity in restraining a judicial officer in the exercise of his legitimate functions, on the ground that he is a necessary and material witness in certain proceedings pending before him, it should appear clearly and unmistakably, that the judicial testimony is not of itself privileged, and that its absence would involve a complete denial of justice. *Marry v. James*, 437
3. In view of the stringent provisions of the statute (2 *Rev. Stat.* 516, § 47), summary proceedings by a landlord against his tenant, pending before a judicial officer having jurisdiction, should be enjoined only in cases of fraud, surprise, or undue advantage in the conduct of the proceedings. *ib.*

See CORPORATIONS, 1, 2, 3.

FRAUDULENT ASSIGNMENTS,

4.

RECEIVER, 2.

TRADE MARK, 1, 4.

INNKEEPER.

1. The plaintiff, who was a guest at the defendants' hotel, on the eve of his departure therefrom, surrendered his room, and at the same time requested the defendant's clerk to take charge of his valise during a short absence from the city, when he would return and pay his bill. The valise was taken charge of, and a brass return check was given therefor to the plaintiff. On the plaintiff's return, several days afterward, he registered his name, and was assigned a room, intending to remain some days. On calling for his valise, and presenting the return check, it was ascertained that the only valise in the baggage-room, bearing the number of the plaintiff's check, was not the plaintiff's valise, which could not

be found. *Held*, that whether regarded as an ordinary bailment, or as property in the defendants' hands, which they had a right to detain until the lien upon it was discharged, the defendants were bound to the exercise of ordinary care and diligence; and the burden was upon the defendants to show the circumstances of the loss. In default of any such affirmative proof by the defendants, the presumption will arise that the defendants were guilty of negligence. *Murray v. Clarke*, 102

2. A public house, which the proprietor designates as a "hotel," and at which guests are provided with lodgings for uncertain periods, and under no express agreement, and which only differs from ordinary hotels in having a refectory on the premises, where guests are at liberty to take their meals, if they wish, and pay for them, then and there: *Held*, To be an inn, and the proprietor an innkeeper, with all the responsibilities attaching to such character, as respects guests received and accommodated with lodgings. *Krohn v. Sweeney*, 200

3. An innkeeper is not relieved from his common law liability, for the loss of his guest's watch and traveling money, by the fact that he has complied with the provisions of the statute of 1855, by providing a safe, and posting notice, as required by that statute (following *Gile v. Libby*, 36 Barb. 70). *ib.*

INSOLVENT DEBTORS.

1. In an application for a discharge under the act to abolish imprison-

ment for debt, it must appear by the defendant's petition either that a suit had been commenced, or a judgment recovered, against him by the prosecuting creditor. *Matter of Andriot*, 28

2. A schedule, setting forth an account of the petitioner's estate, as it existed at the time when he was committed under the act, is defective. It should contain an account of his estate as it existed at the time of his arrest. But the officer to whom the application is made can allow the schedule to be amended in this respect, if satisfied that the omission was unintentional, or arose from a misconception of the statute. *ib.*

3. If an application is made for a discharge within the thirty days allowed, and is denied upon the merits, it cannot be renewed. Whether, if denied for defect of form, it may be renewed before another officer, *query?* *ib.*

4. If the petitioner has been committed under the act for fraudulently disposing of his property, he cannot be discharged from imprisonment by making the assignment of his property provided for by the sixteenth section of the act. The fraudulent disposition of property referred to in this section, is not a fraudulent disposition between the time of his conviction and the application for a discharge from imprisonment. This provision for a discharge applies only to cases where there has been no fraudulent concealment, removal, or disposition of property by the debtor with intent to defraud creditors. The object of the act

was humane and remedial; to relieve from imprisonment the honest but unfortunate debtor, who had no longer the means of satisfying his creditors, and a certain class of fraudulent debtors were excepted from its operation, who may be relieved under the Code, in cases of inability to endure the imprisonment, or to perform the act required, upon such terms as may be just. *ib.*

5. Review of the history of legislation for the relief of debtors, and of the state of the cases anterior thereto. *ib.*

INSOLVENTS' DISCHARGE.

1. The plaintiff, during the pendency of the action, petitioned for his discharge as an insolvent debtor, and afterward suffered a default to be taken in the action, and a judgment for costs was rendered against him before his final discharge as an insolvent. The defendant procured an order for the plaintiff's examination as a judgment debtor, under section 292 of the Code of Procedure, which the plaintiff moved to set aside, on the ground of his discharge as an insolvent, and on the further ground that the judgment by default was taken in violation of a verbal agreement between the parties,—*Held*, That the plaintiff was not discharged from the judgment by the insolvent discharge. *Gardner v. Lay*, 118
2. Although the court will not, in general, decide upon the validity of an insolvent's discharge by affidavits on motion, yet, where the

only question is, whether a discharge, admitting it to be valid, operates to discharge a particular judgment, and there is no question as to the facts, the court will not put a party to an action upon the judgment to determine that question. *ib.*

INSURANCE.

The defendants issued a policy of insurance upon plaintiff's "stock of fireworks—hazardous and extra hazardous." In the body of the policy there was a printed provision, which declared "that the policy shall be null and void whenever any article shall be kept in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for in this policy." The plaintiff kept certain dangerous "colored lights," contrary to the provisions of a city ordinance. These "colored lights" having ignited, and caused the loss, *Held*, in an action upon the policy, that the written provision of the policy, insuring fireworks, &c., was not repugnant to, and did not amount to a waiver of, the printed condition of the policy; the meaning of the policy being that the plaintiff might keep only such a stock of fireworks, and of the kind and quantity, as it was lawful to keep under municipal regulations; and, having violated a regulation, in keeping the colored lights which caused the fire, that the plaintiff could not recover. *Jones v. Firemen's Fund Ins. Co.*, 307

INTEREST.

See DEBTOR AND CREDITOR.

J.

JUDGMENT.

See ARREST, 1.

MUNICIPAL CORPORATION, 2.

L.

LANDLORD AND TENANT.

1. On the trial of an action for rent reserved in a lease, it appeared that the tenant's goods had been injured by rain leaking through the roof, and that the landlord had agreed to apply the tenant's damages on account of the rent as it fell due, which were to be ascertained by selling the damaged goods at auction. The defendant's counsel requested the judge to charge the jury that "if they found that the plaintiff had agreed to ascertain such damages by having the damaged goods sold at auction, and by deducting the amount so obtained from their invoice price, and to apply the amount so ascertained in payment of the rent as it fell due, and that all this was done,—then they should find a verdict for the defendants." *Held*, that the judge properly refused so to charge, as the proposition did not involve the necessity of the jury's finding a mutual agreement, but only an undertaking on the part of one party, which would be without consideration and void. *Walker v. Gilbert*, 80

2. Such an agreement, if mutual and concurrent in point of time, may be upheld; but as the defendant's counsel did not ask to have the jury determine whether such an agreement was made, nor take any exception to the direction to find for the plaintiff, nor ask for judgment on the evidence, on the ground of such an agreement, the verdict for the plaintiff will not be disturbed on appeal. *Id.*

3. A tenant holding over after the expiration of his term, impliedly holds subject to all the conditions of the original letting or lease, and this presumption inures to the benefit of the heir of the lessor. *Hunt v. Wolf*, 298
4. In an action for use and occupation since the death of the lessor, brought by the receiver of his estate, the complaint alleged the original lease between the defendant and his lessor, and that the former "continued to occupy the premises on the same terms and conditions," after the expiration of the term of his lease: *Held*, a sufficient averment of the relation of landlord and tenant, and implying an agreement to pay the same amount of rent reserved in the lease. *Held*, further, that it was not necessary to allege in whom the fee had vested, or who was seized of it. *Id.*

See LEASE.

NEGLIGENCE, 7, 8, 9.

INJUNCTION, 2, 3.

LEASE.

1. A covenant in a lease provided that, if the building demised

should "be destroyed and burned down," and the plaintiff should not rebuild within a reasonable time, the defendants should have the right to terminate the lease. *Held*, that a partial injury of the buildings by fire, so that they could be repaired without rebuilding the structure, was not such a destruction and burning down as was contemplated by the covenant. *Vanderpool v. Smith*,

135

2. An action for the breach of a covenant, upon the part of a lessee, that he will make repairs during the term of the lease; or upon a covenant that he will not make alterations in the leased premises, without the consent of the lessor, may be maintained by the lessor without awaiting the expiration of the term of the lease. *Webster v. Nasser*,

186

3. If there has been an omission to comply literally with the condition respecting notice, in a covenant for a renewal of a lease of land, equity will relieve where a fair intimation of an intention to renew has been given, and no injury has been done to the other party; but not where there has been gross laches, or the neglect has been willful. *Reed v. St. John*,

218

4. Where a lessee agrees to assign his lease, which contains a condition that the landlord may re-enter in case of alienation, he impliedly agrees that he either has obtained, or can and will obtain, such consent of his landlord as is necessary to enable him to vest in the assignee the same estate which

he has himself. *Roberts v. Geis*,

535

5. Whether, in such a case, the lease is only voidable at the option of the landlord, or absolutely void upon a breach of the condition, is immaterial. To render the transfer effectual so as to vest the assignee with the remainder of the term, whether the latter knew of the covenant against an assignment or not, the landlord's consent is necessary, and in the absence of such consent being obtained, the lessee cannot compel the assignee to complete the transfer and pay the consideration. *Id.*

See LANDLORD and TENANT.

M.

MARINE COURT PRACTICE.

1. In an action to recover possession of personal property, in the district and marine courts of New York city, judgment for the plaintiff cannot be rendered in the manner prescribed by section 277 of the Code of Procedure; but should be in the alternative for a return of the property, or for its value, if a return cannot be had as prescribed by the Revised Statutes (2 Rev. Stat. 580, §§ 49, 50). *Stauff v. Maher*,

143

2. The act of 1848 (Laws of 1848, p. 497, sec. 58), conferring upon the marine court jurisdiction in actions for assault and battery, by or against any person on board a vessel in the merchant service, on the high seas, or in a place without the United States, &c., was, by im-

plication, repealed by the act of 1858 (Laws of 1858, p. 1165), which conferred jurisdiction upon that court in all actions for assault and battery, &c., with a limitation only of the amount of damages recoverable. Hence, the marine court has jurisdiction of an action for an assault and battery committed on board a vessel in the merchant service, although not upon the high seas, and not without the United States. *Farley v. De Waters*, 192

See DISTRICT COURT PRACTICE.

MARRIED WOMEN.

1. An action for damages for negligence in the management of her separate estate may be maintained against a married woman without joining her husband. *Eagle v. Swayze*, 140
2. The amendment of the Married Woman's Act, passed in 1862 (Laws of 1862, ch. 172, §§ 7, 8), by which the word "purchase" was then, for the first time, introduced into the statute, did not enlarge the powers or the liabilities of married women, so as to make a married woman, not carrying on any trade or business, and not having any separate property, liable for goods sold and delivered to her. *Schmidt v. Costa*, 251
3. A married woman may execute a valid assignment of a cause of action, relating to her separate property, without the joining of her husband; and this notwithstanding she derived the property

through her husband. *Jay v. Long Island R. R. Co.*, 401

See HUSBAND AND WIFE.

DISTRICT COURT PRACTICE, 2.

MASTER AND SERVANT.

1. A licensed public carman, who carries on business on his own account, with his own capital, and his own wagons, horses, and servants, does not stand in the relation of servant to one who employs him to carry merchandise at an agreed price per package, so as to make the latter liable for the negligence of the servants of such carman. *McMullen v. Hoyt*, 271
2. To defeat a recovery by a servant, for services offered to be performed by him under an unexpired contract of employment, on the ground of his discharge by the master, the latter must establish affirmatively that the discharge was for just cause. A mere admission by the plaintiff upon the trial that his discharge was for "alleged cause," has not the force of present proof of facts from which a sufficient cause may be inferred. *Stern v. Congregation Schaare Rochmin*, 415
3. At a general meeting of the members of a religious society, the plaintiff was elected sexton for one year, at a fixed annual salary, and entered upon his duties. At a meeting of the board of trustees resolutions were afterward passed discharging the plaintiff for "alleged cause," and he was also expelled from membership with the congregation: *Held*, that it not appearing that membership was a

prerequisite to the position of sexton, his expulsion did not affect his legal rights, under the contract of employment as sexton. *ib.*

MECHANICS' LIEN.

1. The object of the mechanics' lien law is to protect the mechanic, laborer and material man, and as between these persons and the owner, the equities of the former are superior to the latter, unless the latter's equities arise out of his contract with the contractor, affecting the right of the contractor to recover the contract price, or the amount that may be due him. *Develin v. Mack*, 94
2. The mechanics' lien laws, and especially the provision (Laws of 1863, chap. 500, § 13) declaring that no transfer of the contractor's interest should affect the right of any person entitled to file liens, operate as equitable transfers to a lienor of the money due to the contractor by the owner at the time of the filing his lien, against which nothing should prevail except that which should spring out of the contract itself, such as omissions from, or violations of, its obligations, affecting its performance, and consequently the amount due to the contractor. *ib.*
3. Hence, where the owner retained, out of the sum due to the contractor, an amount to be held by her, as security for a claim for damages in a suit pending between them in a matter having no reference to the contract for building, as to which a lien was filed by a sub-contractor: *Held*, that such retention must be regarded as a transfer, within the spirit of the provision of the act of 1863, which the contractor had no right to make, and which cannot destroy the equitable assignment of the fund due to the contractor, created by operation of the statute. *ib.*
4. The right of the owner to set off a demand against the contractor, in an action by a sub-contractor to foreclose a mechanic's lien, discussed. *ib.*
5. The notice to create a lien (under the mechanics' lien law of 1855) must be duly verified in the same manner as a pleading; and a complaint, in an action to foreclose a mechanic's lien, which contains no averment that the notice to create the lien was verified, is demurrable, as not stating facts sufficient to constitute a cause of action. *Hallaghan v. Herbert*, 253
6. In an action to foreclose a mechanic's lien, a judgment directing the sale of the premises under execution, and providing the manner in which the proceeds shall be distributed, is in strict conformity with the statute. *Meehan v. Williams*, 367
7. A lien (under the mechanics' lien law of this State) cannot be acquired for work done or materials furnished towards the erection of a public school-house, erected under the provisions of certain statutes, by which it is devoted to a public use, such property being exempt from seizure and sale under an execution, upon grounds

of public necessity. *Brinkerhoff v. Board of Education, &c.*, 448

8. Where, in a proceeding instituted by a contractor under the mechanics' lien law of 1863, it appeared that, after the commencement of the work, but before its completion and the filing of the notice of lien, the owner conveyed the premises to her brother-in-law, one of the defendants, who gave her his note for \$5,000, payable one day after date, and upon which no payments had been made, and who never took possession of the premises, but immediately leased them to his sister-in-law and her husband, who had since occupied them, paying no rent therefor: *Held*, that the conveyance was not *bona fide*, but was made with the intent to defraud the contractor and defeat his lien, and that the latter had an incipient lien when the transfer was made, which became absolute on filing notice thereof with the county clerk, and that he was entitled to have the fraudulent conveyance declared void so far as it interposed any obstacles to the enforcement of his lien. *Meehan v. Williams*, 367

9. The plaintiff contracted with the owner and her husband to erect a house by the 15th day of February, 1865, the consideration to be paid in seven installments, on the completion of certain portions of the work. The husband, who had been a builder, visited the building every other day, and directed changes to be made, and extra work to be done, and paid the plaintiff as the payments became due, making no objection to

the work done, and materials furnished, nor to the delay in the work of plastering. The house was not completed on the 15th February, 1865. Ten days after that date, the plaintiff received from the husband payment of the fourth installment under the contract; and on the 17th day of March was promised payment of the fifth installment, as soon as certain moldings should be put on. The contract provided that on failure of the plaintiff to provide a sufficiency of men or materials, the owner, on giving three days' notice in writing, might complete the building, and deduct the expense from the contract price. The owner and her husband, on the 23d March, 1865, gave notice to the plaintiff to discontinue work, and that they would hold him for damages for failing to complete the building by February 15th. *Held*, that the husband acted throughout as his wife's agent and by her authority, so as to make all that he did binding on her. *Held*, that as the variations from the contract in the building were known to the husband, and he had not objected, they were made with his concurrence, and that there was an acceptance of the work up to the time of the payment of the fourth installment. *Held*, also, that the owner, having assented to an extension beyond the strict letter of the contract, had no right, on March 23d, to put an end to the contract, and the plaintiff could recover for all the contract and extra work done and materials furnished up to that date, and the owner, under the circumstances,

could not recoup damages for delay and deficiencies in the work. *Id.*

10. Under the act of 1863, the lien becomes absolute, to the extent of the right, title, and interest which the owner had in the premises, at the time when the notice was filed, which interest cannot be divested by any sale or transfer made after the commencement of the work, or furnishing of materials. *Id.*

MONEY HAD AND RECEIVED.

By a resolution adopted at a meeting of a voluntary association, the object of which was to form a common fund, out of which to pay each member drafted into the army a fair and equitable share of said fund, or furnish a substitute, the treasurer of the society was directed, in case no draft took place, to pay or return to each member the amount contributed by him to the fund. No draft took place. *Held*, that an action for money had and received might be maintained by a member against the treasurer, to recover the amount of his contribution, it appearing that the latter had possession of the funds. *Koehler v. Brown*, 78

MORTGAGE.

See FORECLOSURE, 1, 2, 3, 4.

MUNICIPAL CORPORATIONS.

1. An ordinance enacted under the general authority given by the city charters and the act of 1806, to the common council, forbidding the keeping of certain fireworks

within the city limits, is binding on all the inhabitants, and has all the force and effect of a law.

Jones v. Firemen's Fund Ins. Co. 307

2. Under an execution upon a judgment against a municipal corporation, the property of the corporation, *not devoted to public use*, may be taken and sold to satisfy the judgment. If there is no such property, the remedy is by *mandamus*, to compel the payment out of any money or fund under the corporate control, or to compel the raising of it by a tax, when the corporation has the power to impose a tax, or if, as is the case in the city of New York, the sanction of the legislature must be obtained, then to compel the corporation to include the amount of the judgment in its budget, or petition to the legislature for authority. *Brinckerhoff v. Board of Education*, 443

See HIGHWAYS, 1, 2.

N.

NATURALIZATION.

A native of Holland came to this country, and after remaining here nine years, returned to Holland, was married there, and for six years followed there the occupation of a mariner. He then returned to the United States, and for fifteen years was employed as a mariner continuously in American vessels, and for the last five years sailed exclusively in a vessel belonging to the port of New York, his wife during all the time being in Holland, where she was sup-

ported by the applicant who had frequently solicited her to come to this country with her children to live, but who preferred to remain there from a natural dread of venturing upon the ocean. *Held*, that the applicant had resided five years in the United States, and one year in the State of New York, within the meaning of the naturalization law, and was entitled to be admitted a citizen. *Matter of Bye*, 825

See DOMICIL, 1.

NEGLIGENCE.

1. It is negligence for a railroad company to permit its cars to stand upon and obstruct a public street; and where, by reason of such obstructions, the view of the track in one direction is cut off, and it was rendered impossible for the plaintiff, in crossing the track, to observe a train approaching in that direction. *Held*, that it was not negligence, as matter of law, for the plaintiff to omit to look in the direction, the view of which was thus obstructed. *McGuire v. Hudson River R. R. Co.*, 76
2. The plaintiff having led his horses, which were gentle and reliable, upon the defendant's ferry-boat, left them, unattended, for a few moments. Being frightened by the boat's whistle, the horses, while thus unattended, started off, and, leaping over the guard-chain at the end of the boat into the river, one of them was drowned. There were no facilities on the boat for tying horses; the guard-chain was not sufficiently elevated to stop the horses in their flight, and no one was employed on the boat to take the care and custody of horses or other animals. It was shown that the driver could not have stopped the flight of the horses, even if he had been at their head or on his box, owing to the slippery state of the boat's deck and the sudden movement of the horses. *Held*, That the court was right in leaving the question of plaintiff's contributory negligence to the jury, and in not granting a nonsuit asked for on that ground. *Short v. Knapp*, 150
3. Although the plaintiff may have been guilty of negligence, yet, if the exercise on his part of ordinary care would not have prevented the injury caused by the defendant's negligence, the court will not say, as matter of law, that the plaintiff's negligence contributed to the injury suffered. *Id.*
4. The plaintiff, an expressman, left his horse standing, untied, in the street, near the curb-stone, while he went to deliver a parcel. The driver of defendant's street car, in attempting to pass the wagon to which the horse was attached, came in contact with the wagon. This caused the horse to change his position, and there was some evidence to show that the injury to the horse and wagon was increased by the movements of the horse. *Held*, (1.) That, in the absence of proof of a restive character or vicious propensity of the horse, it was not negligence, *per se*, to leave him in the street untied, under the circumstances. (2.) That the fact that the damages were increased by the move-

ment of the horse, after the collision, did not relieve the defendant from liability for negligence in causing the collision. *Albert v. Bleecker Street &c. R. R. Co.*, 389

5. It is not negligence for a person to attempt to cross a street railroad track while a car is approaching at a high rate of speed, if there is in fact ample time to cross the track before the car, and the person could have done so but for an unavoidable accident. *Aaron v. Second Avenue R. R. Co.*, 127

6. Thus, where the plaintiff, seeing a car approach, started to cross the street in front of it, but in ample time to have escaped it, but while crossing the track slipped and caught his foot in a hole in the pavement, and was run over by the car before he could escape. *Held*, that a motion for nonsuit, on the ground of the plaintiff's contributory negligence, was properly denied. *ib.*

7. Although a third person may be guilty of negligence in the manner of using the defendant's premises, with the latter's permission, yet where such use, harmless in itself, is rendered hazardous to others by the defendant's neglect to provide sufficient fixtures to his premises, the latter will be liable for the consequences of such neglect. *Kimmell v. Burfeind*, 155

8. A landlord having discontinued the use of gas upon his premises, removed the fixtures from the gas-pipes, leaving the latter open and uncovered, in the apartments which were afterward let to, and

occupied by, the plaintiff. The landlord subsequently gave to the tenant of a lower floor of the premises, permission to introduce gas into the house, which the latter did. In consequence of the gas-pipes in the plaintiff's apartments being open, the room became filled with gas, and an explosion took place, causing injury to the plaintiff. *Held*, that the landlord was guilty of negligence, and, in the absence of contributory negligence on the plaintiff's part, was liable in damages for the injury sustained. *ib.*

9. A landlord who negligently suffers a chimney upon the demised premises, to remain in such a ruinous condition, that, by its fall, it causes injury to his tenant's property, is liable in damages. *Eagle v. Swayze*, 140

See ANIMALS, 1, 2.

APPEALS, 2.

COMMON CARRIER, 5, 7, 8, 9, 15, 17, 19.

DAMAGES, 2.

HIGHWAY, 1, 2.

MARRIED WOMEN, 1.

NEW TRIAL.

1. The strict rules which have been applied in courts of law, for the determination of motions for new trials, have never been recognized in courts of equity. The general rule in equity cases, where issues of fact have been sent to a jury for trial for the information of the court, is, that whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or misdirection on the part of the

judge, a new trial will not be ordered, unless the court, taking the whole of the evidence together, and connecting it with the judge's charge, thinks that injustice has been done by the error committed, and is dissatisfied with the verdict. *Clark v. Brooks*, 159

2. A new trial will not be granted on the ground that incompetent evidence was admitted on the trial, where the evidence was as to facts wholly immaterial to the issues. *Lamb v. Camden & Amboy R. R. Co.*, 454

NEW YORK CITY.

1. The liability of the city of New York, for the defective condition of a public street, is not affected by the fact that the executive duty of enforcing its ordinances by inspection of streets, and reporting violations of them, is vested by law in the Metropolitan Police, an independent body, and not subject to its authority or control. The general control of all public streets is vested in the city corporation, by law, and the right which it has to pass ordinances, and to appoint a city attorney to enforce them, carries with it the power to make those ordinances effectual by the appointment of the necessary servants to accomplish the object. *Reinhard v. Mayor &c. of N. Y.*, 248
2. The comptroller of the city of New York has no authority, independently of the common council, to bind the corporation by contract; and, being an officer whose powers are prescribed by general

laws, every one dealing with him is charged with notice of the limitations of his authority. *Briggs v. Mayor &c. of N. Y.*, 304

P.

PLEADING.

1. Although the complaint in an action upon an undertaking for costs and damages upon appeal, does not contain an averment of the *delivery* of the undertaking, it will not be dismissed on that ground, the answer not averring non-delivery. *Robert v. Donnell*, 64
2. There being sufficient evidence on the trial to warrant the finding, that the undertaking was *filed* with the clerk of the court, the court will, on appeal from the judgment, amend the pleading so as to conform it to the fact proved. *ib.*
3. A denial, in an answer, of a "want of knowledge sufficient to form a belief," of an allegation of the complaint is insufficient, and the allegation of the complaint must be taken as admitted. The denial must be of any knowledge or information. *Heye v. Bolles*, 231

See AMENDMENTS 1, 2.

EXECUTOR AND ADMINISTRATOR, 2.

LANDLORD AND TENANT, 4.
RECEIVER, 1.

POLICE.

1. A police officer or constable cannot arrest a person, without a

warrant, for a breach of the peace
not committed in his presence.
Boyleston v. Kerr, 220

See ARREST, 2, 3.

PRACTICE.

1. To entitle a defendant to a notice of assessment of damages on failure to answer, under subdivision 2 of section 246 of the Code, he must have appeared in the action "before the expiration of the time for answering." Not having appeared until after that time, it is not irregular for the plaintiff to proceed with the assessment without notice to him (overruling *Abbott v. Smith*, 8 How. Pr. 463; and distinguishing *Carpenter v. New York and New Haven R. R. Co.*, 11 Id. 481). *Pearl v. Robit-schek*, 50
2. One of several defendants, not served with process, may anticipate such service by appearing in the action whenever his rights may be affected by the proceedings, and he is then as much entitled to service of papers on him, as if he had duly appeared after service of process (per BRADY, J.) *ib.*
3. A notice to produce a writing upon the trial will be good, although informal and inaccurate in some particulars—*e. g.*, the date of the paper—if it fairly apprize the party of the paper to be produced. *Frank v. Manny*, 92
4. Although, in ordinary cases, the court will grant a stay, pending an appeal from an order denying a motion for a new trial, yet

where the property in controversy includes the good-will of a business, *e. g.*, the publication of a newspaper, which has been carried on pending the litigation by a receiver, the court will not stay a sale, after protracted litigation, without some guaranty, on the part of the party asking it, against depreciation in the value of the property, pending the stay. *Clerk v. Brooks*, 159

See NEW TRIAL.

DISTRICT COURT PRACTICE.
MARINE COURT PRACTICE.

PRESUMPTION.

See BILLS, NOTES, AND CHECKS, 1.
COMMON CARRIERS, 10.
DAMAGES, 1, 2.
INNKEEPER, 1.
PRINCIPAL AND AGENT, 4.

PRINCIPAL AND AGENT.

1. A principal cannot be charged, by a notice to his agent, of a transaction had between the latter and a third person, unless the transaction in question was within the scope of the agent's authority; and whether or not the transaction was within the scope of the agent's authority is a question of fact for the jury upon conflicting evidence. *Spadone v. Manoel*, 263
2. Hence, in a case where there is no proof of express notice to the principal, it is error for the court to submit to the jury the question of the principal's knowledge of the transaction, without, at the same time, instructing them that, unless they find that the agent

had acted in the transaction within the scope of his authority, the agent's knowledge was not the knowledge of the principal, and the notice he had of his own acts was not notice to his principal.

ib.

3. Where there is no evidence upon which even a presumption arises which would justify a jury in finding that the defendant had ratified the act of his agent, it is error for the court to submit to the jury whether or not there was any ratification. *ib.*

4. The mere fact that a transaction between defendant's agent and a third person was entered in books kept by the agent, raises, at most, only a presumption of notice to the defendant. *ib.*

See EVIDENCE, 2.

PUBLIC OFFICER.

1. It being, by statute, the duty of a public officer to deposit all public moneys received by him in some bank selected by him, &c.: *Held*, That the mere designation of a bank by the officer as the depository of the public funds, imposed no duty and conferred no right upon such bank as to such funds, until actually deposited with, and accepted by, it. *Lewis v. Park Bank*, 85
2. The Broadway Bank having been selected by the city chamberlain as the depository of the public moneys, in the place of the Park Bank, which had been selected by a former chamberlain, demanded from the latter the public funds on

deposit with it, which, on refusal, it was compelled, by *mandamus*, to deliver. In an action by the assignee of the Broadway Bank against the Park Bank, to recover damages for the wrongful detention of such moneys: *Held*, On demurrer to the complaint, that no action would lie. *ib.*

R.

RECEIVER.

1. A complaint, in an action for the non-payment of rent, against a tenant of an estate, brought by its receiver, failing to show that he had notified the tenant of his appointment as such receiver, or that he had demanded the rent prior to the commencement of the action: *Held*, bad, on demurrer. He ought to give notice of his appointment, in order to protect the estate from payment to the wrong party, and the debtor from treating, in ignorance of another claim, with an apparent owner. *Hunt v. Wolf*, 298
2. The court having issued an attachment against a defendant, in a divorce suit, for disobedience of an order for the payment of alimony, pending suit, will, in case of the defendant's fraudulent intent to dispose of his property, or to leave the State, interfere by injunction, and will appoint a receiver of defendant's property if necessary to enable the court to apply the remedy provided for by the statute. *Carey v. Carey*, 424

See SUPPLEMENTARY PROCEEDINGS, 8.

REFERENCE.

1. To render a reference compulsory, an account must be directly in issue, or there must be no question remaining to be determined, except the adjustment of the items constituting the account; and it is not sufficient that one may have to be examined collaterally for the purpose of establishing some one of the issues in the action. *Turner v. Taylor*, 278
2. Where in an action on contract, to recover the price of certain lands sold by the plaintiff to the defendants, and by them sold to a company, of which the plaintiff was made superintendent, and the defense to such action was fraud in the inception of the contract, and the failure of the plaintiff to disburse the moneys of said company properly, thus causing the failure of the enterprise; and the defendants applied for a reference, on the ground that it would be necessary to examine the accounts of the plaintiff as such superintendent: *Held*, that such examination was not directly involved in the issue, and was at most one arising collaterally, and that a reference should not be granted. *Id.*
3. Where the report of one referee, finding that the party was dead at a certain time, was set aside for the admission of incompetent testimony, and the report of the next referee, finding that he was alive at that time, was set aside, for the rejection of evidence that ought to have been received, a further reference was denied, though the case was, in its nature, referrible, and it was ordered to be tried by a

jury, for the reason that the conclusion of twelve men upon such a point, under such circumstances, would be more satisfactory than the finding of a referee. *Stouvenel v. Stephens*, 319

See APPEAL, 4, 5.

REPLEVIN.

The common law action of replevin, and its modifications by the Revised Statutes and the Code of Procedure, considered. *Stauff v. Maher*, 142

S.

SALES.

1. One who voluntarily parts with his goods, on a sale thereof, although thereto induced by the false and fraudulent representations of the buyer, cannot recover their value from a third person who has purchased them from the fraudulent buyer, for value, and without notice. *Craig v. Marsh*, 61
2. One V., falsely representing himself to the plaintiff to be the agent of the defendant, induced plaintiff to sell and deliver to him certain goods, which V. immediately sold, in the regular way, to the defendant, for value, without notice of the plaintiff's rights: *Held*, that by delivery of the goods the plaintiff conferred upon V. an apparent right of property, and he could not recover the price from the defendant. *Id.*
3. The owner of goods who, by his

conduct, enables another to assume the credit of their ownership, whereby a third person is led to purchase them in good faith, cannot recover either the goods or their value from the buyer. It is not necessary that the owners should stand by and permit the sale. *McCaughey v. Brown*, 426

4. It being unlawful, by a city ordinance, for any one to take out a license as a public cartman, except the actual owner of the cart licensed: *Held*, that where the owner of a cart permitted another to take out a license for his cart, it was tantamount to a declaration of ownership by the licensee, with the owner's knowledge and consent, and the latter will be estopped from claiming ownership as against a *bona fide* purchaser of the cart from the licensee. *ib.*
5. The plaintiff sold goods to C., to be paid for on delivery after their arrival in New York. On their arrival in New York, C., on the pretense that he desired to examine the goods, induced the plaintiff's agent to give him, for that purpose, the carrier's receipt for the goods. Upon the receipt thus obtained the carrier delivered the goods to C., who forthwith put them on board the defendants' vessel consigned to Havana. The plaintiff's agent learned the fact the next day, and on the following day, and a few hours before the sailing of the defendants' vessel, he demanded the goods from the defendants, and offered to pay the freight and to indemnify them in a bond for double the value of the goods. The defendants refused to unship the goods, unless indemni-

fied in the sum of \$50,000, as it would necessitate moving a large part of the cargo, and delay the voyage a day or two. *Held*, (1.) That the delivery of the carrier's receipt to C. was not, under the circumstances, a delivery of the goods to him, nor a waiver of payment therefor, so as to pass the title. (2.) That as it was through the incautious act of the plaintiff's agent that C. was able to get possession of the goods, and to ship them on board of the defendants' vessel, the latter, being innocent parties, were not bound to detain their vessel and unload their cargo to enable the plaintiff to recover his goods, unless they were indemnified for any loss or expense they might thereby incur. (3.) The burden of proof was upon the defendants to show that the indemnity tendered by the plaintiff was insufficient to cover the loss or damage they would incur by the delay, &c., and having failed to show it, they were liable to the plaintiff as for a conversion of the goods. (4.) The issuing, by the defendants, of a bill of lading of the goods, furnishes no defense to such an action. *Bassett v. Spofford*, 482

6. A person who accepts a delivery of goods manufactured for him on his order cannot resist an action by the manufacturer for the price, on the ground of a breach of warranty of *quality*, without showing that he returned, or offered to return, the goods as soon as he discovered the defect. *Pomeroy v. Shaw*, 267
- 7 A mere objection to the quality of an article, by the defendant, not.

accompanied by an offer to return the same, is insufficient, and the objection is waived by the defendant's subsequently reducing the article to use. *ib.*

8. An unconditional acceptance by a vendee of a delivery of goods on a day after the one agreed upon for the delivery, is a waiver of any claim for damages by reason of the delay. *ib.*

SAVINGS BANKS.

A statute which is inconsistent with some of the provisions of a former statute, impliedly repeals the latter, so far as the provisions are incompatible with each other, leaving the former law in full force and effect in all other respects. Subsequently to the passage of the General Statute of 1853 (Laws of 1853, ch. 257), which requires that all savings banks, then or thereafter to be created in the counties of New York and Kings, shall pay interest on deposits, at the rate of one per cent. per annum greater on sums of \$500 and under, than on sums exceeding \$500, the act incorporating the defendant as a savings bank was passed. By the latter act, the defendant's trustees, were required to regulate the rate of interest to be allowed to all depositors without distinction, so that the latter should receive a ratable proportion of all the profits of the defendant's business, and provision was made for the distribution of surplus moneys, from time to time, among depositors. The defendant's trustees, having fixed the rate of

interest on all deposits at 5 per cent., the plaintiff, a depositor of \$250, sues to recover an additional one per cent. interest upon that amount. *Held*, on demurrer to the complaint, that he could not recover. *Werner v. German Savings Bank*, 406

See BAILMENT, 1, 2.

SERVICE.

Where one party is bound to avail himself of a covenant, to give notice within a certain time, and the other directs the notice to be sent to him by mail, it is sufficient if it is deposited in the post-office within the time, though it does not reach the other party until a day or two afterward. *Reed v. St. John*, 213

See COMMON CARRIER, 3.

SPECIFIC PERFORMANCE.

See FORECLOSURE, 1, 2, 3, 4.

STATUTES.

1. The grammatical rule, which is also the legal rule in construing statutes, is, that when general words occur at the end of a sentence, they refer to and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows. Effect of substituting *or* for *nor* in a statute, considered. *Coxon v. Doland*, 66
2. The execution of a power conferred by statute upon a public

officer, concerning the rights of third persons, may be insisted upon as a duty, although the phraseology of the statute be permissive, and not peremptory. *Hogan v. Deolin*, 184

3. A statute, which, in general terms, gives a court jurisdiction and cognizance of a certain class of actions, except as to the amount of damages which may be claimed, must be regarded as repealing, by implication, a previous statute, by which the court could exercise only a qualified jurisdiction in such actions. *Farley v. De Waters*, 192

See ARREST, 2, 3.

MARRIED WOMEN, 2.

SAVINGS BANKS, 1.

SUPPLEMENTARY PROCEEDINGS.

1. A parol agreement between the parties to a suit that the action should be discontinued without costs, and that, therefore, a judgment dismissing the complaint with costs, against the plaintiff, was a surprise to him, are not grounds for vacating an order for the plaintiff's examination on proceedings supplementary to an execution on such judgment. The remedy is by an application to open the judgment. *Gardner v. Lay*, 113
2. It is not essential to state, in an affidavit to obtain an order for the examination of a judgment debtor, in supplementary proceedings upon a judgment in a court of record, that the judgment has been docketed in the county clerk's office.

It is otherwise where the proceedings are founded upon a judgment obtained in a District Court of the city of New York. *Kennedy v. Thorp*, 258

3. A receiver of the property of a judgment debtor, appointed in supplementary proceedings, is not estopped from proving that the debt for which the judgment was obtained was fraudulently incurred, by the fact that the judgment creditor waived the fraud by bringing an action for the debt. *ib.*

SUMMARY PROCEEDINGS.

See CITY JUDGE.

INJUNCTION, 2, 3.

SURROGATE.

See EXECUTOR AND ADMINISTRATOR, 1; 2, 3.

T.

TRADE-MARK.

1. Equity will restrain a person from fraudulently using another's trade-mark, and from imposing his goods thus trade-marked upon the public. *Curtis v. Bryan*, 312
2. One who in and by his trade-mark makes representations which deceive the public cannot ask a court of equity to restrain the use of such deceptive trade-mark by another. But a mere false or exaggerated statement in a public advertisement of the manufactured article, tending to recommend its use to the public, will not deprive

the owner of a right to be protected in the exclusive use of his trade-mark. *ib.*

3. One who has fraudulently imitated the trade-mark of another, and offered for sale his own goods as those of the owner of the trade-mark, cannot be heard to raise the objection that the latter's goods are injurious to health. *ib.*

4. A party will be restrained by injunction from using a label as a trade-mark, resembling an existing one in size, form, color, words, and symbols, though in many respects different, if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when the two were compared, and yet not so much so, that the difference would be detected by an ordinary purchaser unless his attention was particularly called to it, and he had a very perfect recollection of the other trade-mark.
Lockwood v. Bostwick, 521

5. It will be inferred in such a case, that the design was to obtain in the manufacture and sale of an article, any benefit or advantage that might be gained by its being purchased for another article of the same description which was known in the market, and a court of equity will protect a party from any such attempt on the part of a rival, to reap the fruits of the enterprise and industry of the other, in making his fabric known and recognized by a distinctive trade-mark. *ib.*

6. The sale or transfer of the woodcuts of a trade-mark does not car-

ry with it the property in the trade-mark itself, unless under circumstances indicating that such was the intention, and this will not be inferred where they were transferred to be used in the printing of labels to be placed upon an article which, by agreement, was to be manufactured under the supervision of the proprietor of the trade-mark. *ib.*

7. There is a right of property in a trade-mark which may be transferred to another by assignment. *ib.*

TRESPASS.

The sheriff, under an indemnity from a subsequent execution creditor, and at his instance, sold property upon which he had previously formally levied under a prior execution, in favor of another creditor against the same defendant. The sheriff applied the whole proceeds of the sale to the satisfaction of the prior execution. *Held,* That the subsequent creditor, as the indemnitor and director of the sheriff, was liable, in an action by the owner of the property sold, as an original trespasser, and that the fact that the proceeds of the trespass went to satisfy the first execution, did not tend to mitigate the damages.
Weber v. Ferris, 404

TRIAL.

1. Where an order of reference to assess damages on failure to answer was, by mistake, obtained from another court than that in

which the action was brought, and the witnesses were examined thereunder; but afterward, the mistake having been discovered, the case was referred by the proper court to the same referee, before whom all the witnesses, except one, re-swore to their depositions: *Held*, that the irregularity was cured as to the witnesses re-sworn after the referee had been duly appointed; and the fact that the referee had attached to his report some testimony which was irregularly taken is not a ground for vacating his report, when the objectionable deposition may be entirely suppressed and disregarded without impairing the report itself. *Pearl v. Robitschek*, 50

2. Where the matters inquired about, upon the cross-examination, are directly connected with the subject of the inquiry of the suit, the answers elicited are not conclusive against the examiner; and he may, by other proof, contradict the testimony of the witness, although he cannot impeach his general credibility and character. *Frank v. Manny*, 92

U.

USAGE.

See COMMON CARRIER, 4, 5, 6.

V.

VENDOR AND PURCHASER.

1. A bond, given by the vendors of certain property, conditioned that if the premises should be released from the lien of a certain judgment on or before a certain day, the bond should be void, &c., is not an absolute promise on the part of the obligors to pay and discharge the judgment. It is merely an undertaking to indemnify against damage which the grantee of the premises might sustain by force of "the lien" of the judgment. *Philips v. Smith*, 292
2. In an action upon such a bond by the purchaser, for condition broken, it must appear affirmatively that the judgment was a lien on the property at the time of the conveyance. 36.

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